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No. 272

In the Supreme Court of the United States

OCTOBER TERM, 1939

NATIONAL LICORICE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON ~~PETITION FOR A~~ WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 867–897) are reported in 7 N. L. R. B. 537. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 907–913) is reported in 104 F. (2d) 655.

JURISDICTION

The order of the Circuit Court of Appeals was entered July 6, 1939 (R. 914–917). The petition for a writ of certiorari was filed August 7, 1939, and granted October 9, 1939. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the findings of the National Labor Relations Board that petitioner had violated Section 8 (1), (2), and (5) of the National Labor Relations Act were supported by evidence.

2. Whether the Board erred in ordering petitioner to discontinue its contracts with the Collective Bargaining Committee, a labor organization of its employees, and with certain individual employees.

3. Whether the order to discontinue the contracts violated any rights which petitioner may assert under the Fifth Amendment, either because of an alleged stipulation or because of lack of notice to the Committee or the individual employees.

4. Whether the charge was adequate to support the complaint and order.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C. Supp. IV, Sec. 151 *et seq.*) and of the Rules and Regulations of the Board are set out in the Appendix, *infra*.

STATEMENT

On August 2, 1937, the Bakery and Confectionery Workers International Union of America, Local 405 (hereinafter called the Union), filed with the Board's Regional Director in New York City an amended charge alleging that petitioner had engaged in certain unfair labor practices affecting commerce, within the meaning of the National Labor Relations Act (R. 772–773). On October 7, 1937, the Board, by its Regional

Director, served a complaint and notice of hearing upon petitioner (R. 774–780). Petitioner, on October 11, 1937, filed a written notice of motion for a bill of particulars (R. 783–788), and on October 13, 1937, filed an answer, which in addition to other matters not now in issue, denied that it had engaged in the unfair labor practices charged (R. 790–798).

Pursuant to notice, a hearing on the complaint was held in New York City on October 13–16 and 18–20, 1937, before a Trial Examiner duly designated by the Board. The Board, petitioner, and the Union were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence was afforded to all parties. At the beginning of the hearing counsel for the Board served a bill of particulars (R. 799–801, 802–803).

On February 8, 1938, the Trial Examiner filed his intermediate report (R. 804–828), finding that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (5) and Section 2 (6) and (7) of the Act (R. 824–825). He recommended that petitioner cease and desist from those violations, and, upon request, bargain collectively with the Union (R. 826–828). Petitioner filed exceptions to the report (R. 829–837). Oral argument was granted, but subsequently waived (R. 839–841).

On May 31, 1938, the Board rendered its decision, setting forth its findings of fact, conclusions of law, and order (R. 867–897). Briefly summarized, they are as follows:

Petitioner is a New York corporation with plants in Brooklyn, New York; Philadelphia, Pennsylvania; Moline, Illinois; and Montreal, Canada (R. 873). These proceedings involve only the Brooklyn plant (R. 873). Petitioner is engaged in the business of manufacturing and selling licorice products and confections for drug, confectionery, grocery, and allied trades (R. 873–874). Approximately 48 percent of the raw materials used are purchased from points outside the State of New York, and about 41 percent of the finished products of petitioner are sold and shipped outside the State of New York to points in 27 States (R. 874).[1] The normal force at the Brooklyn plant, excluding clerical and supervisory employees, is approximately 140 persons (R. 874).

The findings of the Board with respect to the unfair labor practices (R. 874–892) are discussed in detail in Point I, *infra*, pp. 13–29. In summary, the Board found that petitioner, by refusing to bargain collectively with the Union, has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act. The Board also found that petitioner, by coercing and intimidating its employees in the exercise of their rights to self-organization and collective bargaining, and by persuading and coercing its employees to refrain from becoming members of the Union and to sign certain individual contracts of employment, has engaged in an unfair labor practice within the meaning of Section 8 (1) of the Act. Finally, the Board found that petitioner, by initiating,

[1] The jurisdiction of the Board is not in issue.

sponsoring, and dominating a labor organization of its employees known as the Collective Bargaining Committee, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. 893–894).

Upon the basis of those findings, the Board entered an order (R. 894–897) requiring petitioner to cease and desist: from dominating and interfering with the administration of the Collective Bargaining Committee or any other labor organization of its employees; from recognizing the Committee as the representative of any of its employees; from giving effect to its contracts with the Committee and with the individual employees; and from refusing to bargain collectively with the Union. As affirmative relief designed to effectuate the policies of the Act the Board ordered petitioner: to withdraw recognition from the Committee; to inform, in writing, the Committee and each of the employees who signed an individual contract that such contract is in violation of the National Labor Relations Act, that the employees are relieved of all obligations under them, and that respondent will no longer demand their performance; to bargain collectively, upon request, with the Union; and to post appropriate notices.

On August 29, 1938, the Board filed in the court below its petition for enforcement of the order (R. 4–12). On June 12, 1939, the court directed enforcement of the Board's order, with the exception of the paragraphs (I (d) and II (c)) dealing with bargaining with the Union, which were modified to the extent of conditioning the order to bargain with the Union

upon a determination, in an election, that the Union is still the choice of a majority of the employees (R. 907–913).[2] An order of enforcement in accordance with the opinion was filed on July 6, 1939 (R. 914–917). Thereafter petitioner filed its petition for a writ of certiorari, which was granted on October 9, 1939.

SUMMARY OF ARGUMENT

I. The evidence fully supports the Board's findings of fact that petitioner engaged in unfair labor practices within the meaning of Section 8 (1), (2), and (5) of the Act. Petitioner, strongly opposed to "outside" unions, undertook to counter the Union's organizational drive by the use of the so-called "Balleisen" anti-union technique. Following the receipt of a request by the Union for collective bargaining, petitioner called meetings of its employees at which it denounced the Union and suggested the formation of an "inside" organization; selected a committee of employees to propagate its views among the employees; and sponsored the circulation among the employees of a petition calling for the supercession of the Union as bargaining representative by a committee of employees. Thereafter, it engaged in a process of sham negotiation with the Union, making no sincere attempt to arrive at a mutually satisfactory understanding and, in fact, announcing that it would under no circumstances sign an agreement with the Union. Moreover, al-

[2] Although the Board has filed no cross-petition on this issue, it does not agree that the court below was correct in thus modifying its order.

though the Union represented a large majority of the employees in an appropriate unit, petitioner refused to recognize the Union as the exclusive representative of the employees in such unit. Petitioner's conduct provoked a strike among the employees, during the course of which petitioner, in addition to refusing again to bargain with the Union, sought to break the strike by vilifying the Union to the employees. After the strike, which was unsuccessful, petitioner assisted in the formation of, and thereafter dominated, a labor organization of its employees known as the "Collective Bargaining Committee." Petitioner recognized and engaged in spurious negotiations with the Committee, the outcome of which was the execution of a series of "individual contracts" which impose unlawful limitations upon the right of the employees to engage in union activities.

II. The Board properly ordered petitioner to discontinue the contracts referred to above. The contracts were procured by means violative of the Act in that they were made through the instrumentality of a company-dominated labor organization; and were a part of the petitioner's campaign to crush the Union. The company-dominated Committee acted as petitioner's agent in "persuading" the employees to sign the contracts and petitioner announced that only those employees who signed the contracts would receive the benefits granted in the contracts or "protection" in their jobs. In addition, the contracts interfere with the exercise of rights guaranteed in the Act by requiring the employees to pledge themselves not to seek a signed contract with

any union and not to seek redress through collective bargaining representatives against arbitrary or unlawful discharge. Furthermore, the contracts take away the right of employees to seek changes in existing agreements (*National Labor Relations Board* v. *Sands Manufacturing Co.*, 306 U. S. 332, 342) by requiring the employees to agree not to request a closed shop or a signed union agreement. Petitioner's suggestion that the employees, by signing the contracts, "waived" their rights under the statute, is without merit, since "rights" under the Act are not private, but are granted in the public interest and cannot be "waived." See *Grandview Inland Fruit Co.* v. *Hartford Fire Insurance Co.*, 66 P. (2d) 827, 834, 189 Wash. 590, 109 A. L. R. 1472. Since both the making of the contracts and their terms were violative of the Act, the issuance of the order to cease and desist from giving effect to the contracts was mandatory under Section 10 (c) of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. The order is likewise sustainable as a valid exercise of the Board's power to order such affirmative action as will effectuate the policies of the Act. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236.

III. There was no stipulation by Board counsel that the question of the legality of the contracts, a matter clearly put in issue by the pleadings, was to be removed from the case. The record shows convincingly that the contract issue was fully litigated and that petitioner was in no way misled or prejudiced by the alleged "stipulation."

The notice and hearing afforded petitioner was fully adequate to support the order to discontinue the contracts despite the lack of notice to the Collective Bargaining Committee and the individual employees. The present case is governed by the decision of this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271. Accord: *National Labor Relations Board* v. *Pacific Lines*, 303 U. S. 272. Like the Association in the *Greyhound* case, the Committee was found on substantial evidence to be employer-dominated, within the meaning of Section 8 (1) and (2). The order here in question, likewise, was both appropriate and essential to the performance of the Board's duty to prevent unfair labor practices affecting commerce (Section 10 (a)). The order does not run against the Committee or the individual employees and their presence was not necessary in order to determine whether petitioner had violated the statute or to make an appropriate order against it. The present case cannot be distinguished on the ground that "contract" rights are here involved. The primary asset of a labor organization is its claim to recognition as the collective bargaining representative of the employees in negotiations with their employer. *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515; *Texas & N. O. Ry. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 571. Whether the employer confers recognition by written contract or by tacit agreement is not here material. The form in which recognition is embodied does not change its vital significance to the union and should not be permitted to obscure the effect on the union of an order to

cease recognition and to disestablish the union as the bargaining agency. The procedure followed by the Board in the present case and approved in the *Greyhound* decision complies fully with the requirements of notice and hearing set up by Congress. The provisions of the Act are comprehensive and indicate an intention to exclude any requirement of notice to persons other than employers. No question of the constitutional adequacy of the statutory procedure, as applied to the Committee and the individual employees, is before this Court or was before the court below. Even if a constitutional question had been properly raised, the statutory procedure as applied in this case is clearly constitutional. The *Consolidated Edison* case, 305 U. S. 197, was concerned with a wholly different situation. In the opinion of the Court, there was no basis for a finding that the contracts which were there ordered to be set aside were a consequence of the unfair practices of the employer or in themselves thwarted any policy of the Act or that their cancellation would in any way make the order to cease and desist the unfair practices any more effective. Had the order been supportable, in the view of the Court, as an exercise of the Board's power to remove the consequences of unfair labor practices, the *Greyhound* rule would have applied and the fact that third persons were incidentally affected by the order would have been immaterial. The opinion in that case nowhere suggests that persons other than employers are necessary parties to a determination whether an employer has committed unfair labor practices. That issue is triable only between the Government and the employer.

There is no merit in the suggestion that the equitable rule of indispensable parties prevents the enforcement of the order in question here. This Court, so far as we are aware, has never refused, at the suit of the Government, to enjoin the continuance of activity in violation of public rights on the ground that an absent party had an interest in the illegal activity. The *Consolidated Edison* case is not an exception to this line of authorities. The direction there refused enforcement was regarded as in no way making the command enjoining the unlawful activity any more effective (305 U. S. at 236). Moreover, the procedure before the Board is, except for possible qualifications where constitutional rights are concerned, within the control of Congress. There is slight basis, if any, for concluding that Congress intended to adopt as part of the statutory procedure a vague formula, not susceptible of accurate description, as to indispensable parties. The *Consolidated Edison* case does not hold to the contrary. The suggestion there advanced with respect to notice and hearing was prompted by doubts as to the constitutional adequacy of the procedure under the circumstances (305 U. S. at 233). The proceeding here in question arises under entirely different circumstances. There is no constitutional issue properly before this Court, and even if there were, there is no merit to it.

IV. The Board's complaint "states the charges" in respect to the unfair labor practices, as required by Section 10 (b), and does not "go beyond" the charges by alleging the commission of new unfair labor practices. No fatal variance arises from the fact that the complaint, which speaks as of a later date than the

charge, alleges that the unfair labor practices brought in question by the charge have continued down to the date of the issuance of the complaint. In any event, the function of a charge is to call the attention of the Board to an alleged violation of the Act. Should the Board, in the course of the investigation which Congress authorized it to conduct following the filing of charges (Section 11), find evidence of additional violations of the Act, it is entirely proper for the Board to allege such violations in its complaint without going through the useless formality of informing the charging party of its discoveries and suggesting the filing of supplementary charges. The contrary view confuses proceedings under the Act, which are in the name of the Government and seek the effectuation of an important national policy (*Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 150 (C. C. A. 5th)), with proceedings concerned solely with private rights. See *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25.

ARGUMENT

I

THE FINDINGS OF THE BOARD THAT PETITIONER HAD ENGAGED IN UNFAIR LABOR PRACTICES IN VIOLATION OF SECTION 8 (1), (2) AND (5) OF THE ACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE[3]

The findings of fact as to the unfair labor practices have been concurred in by the Board and the Circuit

[3] While the petition (pp. 10, 12) might be construed as challenging the Board's order of disestablishment of the Collective Bargaining Committee on the ground that the finding that petitioner dominated and interfered with the Committee in violation of Sec-

Court of Appeals and hence, under the accepted rule, will not be disturbed by this Court unless plainly erroneous. *Illinois Central, &c. Railroad* v. *Interstate Commerce Commission*, 206 U. S. 441, 466. See also *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 542. A brief review will suffice to show that the findings are fully supported by the evidence.

The Union began its activities at petitioner's Brooklyn plant in early July 1937, when a number of petitioner's employees there requested Galvin, the president of the Union, to assist in organizing the plant (R. 874; 43, 240). By the evening of July 14, of the approximately 140 employees within the appropriate unit (R. 39),[4] 99 had signed applications for membership

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tion 8 (2) of the Act is not supported by substantial evidence, it does not attack the other provisions of the order, or the findings on which they are based, on that ground. The fact that the specifications of error set forth in the supporting brief (pp. 16–17) contain a general attack upon all other portions of the Board's order does not cure the limitations of the petition for certiorari, or constitute an effective challenge to the Board's findings and order with respect to the violations of Section 8 (1) and (5) of the Act. See *General Pictures Co.* v. *Electric Co.* 304 U. S. 175, 178. Nevertheless, in order that a complete picture may be before the Court, we shall summarize the evidence relating to the violation of those sections as well as that relating to the violation of Section 8 (2).

[4] There is no controversy with respect to the appropriate unit. The Board found that the unit should include all the production employees of the Company, including working foremen, but should exclude executive, supervisory, and office employees, salesmen, and truck drivers (R. 887).

(R. 875; 258, 272–275, 181, 241, 741). Each application designated the Union as the applicant's bargaining agent (R. 134). Consequently, as the Board found, on July 14, 1937, and thereafter, the Union represented a majority of the employees in the unit (R. 888).

On the evening of July 14 Galvin sent a telegraphic night letter to petitioner, requesting that a date be fixed for a bargaining conference (R. 875; 181, 391, 858). Petitioner received the telegram on the morning of July 15 (R. 875; 605–606, 717), but did not reply to it or acknowledge its receipt (R. 875; 44, 446–447). Instead, petitioner's president, Sanford, called a meeting of the employees on July 16, and, reading from a prepared paper,[5] informed the employees that they were "one big, happy family," that it "was not necessary" for them to "go to an outside union," and that he would not recognize an outside union (R. 875; 299, 327, 342, 351). He then said (R. 300):

> Before I leave this room I want you to pick your own committee, and after you pick your own committee you come downstairs into my office and bargain with us.

Supervisory employees also spoke, urging the employees to accept Sanford's suggestion (R. 875; 326–330, 297–301, 349–351), but the proposal was rejected (301–305, 359).

On July 19 or 20, Galvin and Picariello, one of the trustees of the Union, called at the plant and sought a collective bargaining conference with petitioner's offi-

[5] Counsel for petitioner, although requested to do so, declined to offer this paper in evidence (R. 329).

cials (R. 875; 44). They brought with them a proposed agreement which had been approved by the employees, and 109 signed applications (R. 875–876; 44–45, 258). Galvin offered to show the membership cards to Sanford, but when Sanford declared that he would not bargain with the Union even if it did represent a majority (R. 876; 144), Galvin withdrew the offer (R. 876; 45, 71–73, 144). Sanford asserted that he had some doubt as to the identity of the union officers, but he refused to telephone to either the American Federation of Labor or the Union offices to satisfy himself (R. 875–876, 59–60, 452). The Union's proposed agreement was not discussed at all (R. 144).

On the following afternoon, Sanford summoned to his office a group of about 14 employees who had been selected as best able to convey petitioner's views to the other employees (R. 876; 460, 626). These employees were told that "two very lovely young gentlemen who purported to be representatives of yours" had visited the plant that morning (R. 876; 459, 624). Sanford then stated that petitioner proposed to grant, beginning July 1, 1938, a 5-percent wage increase, time and one-half for overtime, and one week's vacation with pay (R. 876; 301–303), and asked the employees to contact the other workers and then come down and see him again (R. 303). The employees were dissatisfied with the offer, and it was dropped (R. 876; 305).

Shortly thereafter, Dorsey, petitioner's superintendent, selected about eight employees to circulate a petition nominating a committee to supersede the Union

as the collective bargaining representative of the employees (R. 876; 306–311, 357–361). The employees did not at first understand the purport of the petition, but as soon as they became aware of its effect they struck out their signatures and returned the petition to Dorsey (R. 876; 308–310, 356–361, 386–389). There is evidence that Dorsey was present when a number of signatures were obtained (R. 876; 309, 357–358). The petition eventually came to Healey, petitioner's assistant secretary, who destroyed it (R. 461).

On July 21 the Union filed with the regional office of the Board a petition asking to be certified as the exclusive collective bargaining agent of petitioner's production employees (R. 876; 47). A meeting of representatives of both petitioner and the Union was arranged for July 28 at the office of John T. McCann, a representative of the Board, and at that meeting, upon McCann's assurance that he was convinced that the Union represented petitioner's employees, Sanford and Healey agreed to meet with the Union representatives on the following day (R. 876–877; 464–466).

Accordingly, on July 29, Galvin, Anderson, Sklar, and Picariello, representing the Union, arrived at petitioner's plant, and met with Sanford, Carpentier (a vice president), Smylie, and Healey, representing petitioner (R. 877; 49, 467). Since petitioner raises no specific challenge to the finding of the Board, approved by the court below, that the "negotiations" of July 29 did not in fact constitute collective bargaining within the meaning of Section 8 (5) of the Act (see p. 13, n. 3,

supra), it is unnecessary t relate the events of the conference in detail. A gen ral statement, however, will illuminate petitioner's attitude.

Sanford, reading from a prepared statement, disposed of the Union's demands one by one, characterizing them as "impossible," "impractical," "preposterous," or "unworkable" (R. 877; 49–53, 94, 101). He then presented counterproposals similar to those made to the employees' group on July 20 (R. 877; 95–97, 100). The whole meeting was conducted in a manner designed to prevent discussion; whenever a point came up Sanford would simply reread the passage concerning which the question was asked (R. 877; 50, 84, 147, 197–198).

Equally significant was the revelation of petitioner's position with respect to recognition of the Union. At the very outset of the conference petitioner made it clear that under no circumstances would it make a contract with the Union (R. 877; 54, 101–102, 105, 203). Moreover, whereas on the preceding day Sanford had apparently agreed to recognize and bargain collectively with the Union as the exclusive representative of the employees, he now insisted that he would recognize the Union as the bargaining agent *for its members only* (R. 890; 50–52, 145–146). Indeed, there is evidence that Sanford did not regard the Union as possessing any representative authority at all, but considered the organization as a mere conduit whose sole function was "to bring the results of the conference to his employees" (R. 50) and then retire from the scene, leaving petitioner free to deal directly with its employees and

to require them to sign individual contracts of employment (R. 877; 50–51, 54, 96, 105, 135, 145, 150). When Galvin stated that the whole course of proceedings had a familiar ring, Sanford admitted that the Brooklyn Chamber of Commerce was advising them (R. 877; 57).[6] At the conclusion of the meeting Galvin made a request for a further conference, but no arrangements for it were made (R. 877; 112).

On August 2, Anderson telephoned Sanford and asked for a copy of the transcript of the July 29 meet-

[6] The reference is to the method of evading the National Labor Relations Act devised by L. L. Balleisen, of the Brooklyn Chamber of Commerce (see R. 719–721). Under the Balleisen formula the employer refuses to sign a contract with the union representing the majority of the employees, and insists instead that the contract be "executed between the company and each workman individually and not as a collective agreement with representatives of the employees, as provided by the act." *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97, 100 (C. C. A. 2d). The formula was condemned in the *Hopwood* case, *supra*, and in *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61 (C. C. A. 2d), and has been held by the Board to violate the Act in a number of cases. *Matter of Atlas Bag and Burlap Co.*, 1 N. L. R. B. 292; *Matter of Cating Rope Works, Inc.*, 4 N. L. R. B. 1100, consent decree enforcing Board's order entered October 3, 1938 (C. C. A. 2d); *Matter of Metropolitan Engineering Co.*, 4 N. L. R. B. 542; *Matter of the Jacobs Bros. Co., Inc.*, 5 N. L. R. B. 620; *Matter of Federal Carton Corp.*, 5 N. L. R. B. 879, consent decree enforcing Board's order entered October 25, 1938 (C. C. A. 2d); *Matter of David E. Kennedy, Inc.*, 6 N. L. R. B. 699; *Matter of Art Crayon Co., Inc.*, 7 N. L. R. B. 102; *In the Matter of Eastern Footwear Corp. etc.*, 8 N. L. R. B. 1245; *In the Matter of American Numbering Machine Co.*, etc., 10 N. L. R. B. 536; *In the Matter of Centre Brass Works, Inc.*, etc., 10 N. L. R. B. 1060; *In the Matter of Fanny Farmer Candy Shops, Inc.*, etc., 10 N. L. R. B. 288; *In the Matter of National Meter Co., etc.*, 11 N. L. R. B. 320.

ing, which Sanford had promised to give the Union (R. 878; 162–163). Sanford informed him that the notes had been jumbled, and that the stenographer had left on her vacation (R. 878; 163, 188). Upon Anderson's request, another meeting was set for August 5 (R. 878; 163–164).

During the morning, however, petitioner's employees stopped work and gathered in the shipping room away from the machines, where they remained for the balance of the afternoon (R. 878; 312). The strike was not called by the Union, but rather was a spontaneous expression of dissatisfaction with the course of the negotiations (R. 878; 115–121; 243–244, 311–312). Although petitioner immediately called police and hired guards, there was no violence, and the employees left the plant later in the afternoon (R. 878; 316–317, 513).

Petitioner, of course, was under an obligation to bargain notwithstanding the strike,[7] but there is convincing evidence to support the finding of the Board (R. 889–890) that it failed to do so upon request during that period. Anderson learned of the strike about 1 p. m.

[7] Section 2 (3) of the Act; *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875, 879 (C. C. A. 2d), cert. denied, 304 U. S. 579; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), cert. denied, 302 U. S. 731; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179 (C. C. A. 6th); *Titan Metal Mfg. Co.* v. denied, 304 U. S. 575; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18, 22 (C. C. A. 9th); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 867, 868 (C. C. A. 2d), cert. denied, 304 U. S. 576; cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345.

on August 2 (R. 878; 162–163, 167, 184). He immediately called Sanford and offered to do anything in his power to help settle it (R. 878; 168, 223). Sanford, however, accused Anderson of having called the strike, which Anderson denied, and refused to talk with him further (R. 878; 168). Anderson then went to the plant and expressed to Healey his desire to help settle the strike. Upon inquiry he was told by Sanford through Healey that the August 5 meeting had been called off (R. 879; 169). Anderson's appeal to the New York State Labor Relations Board was likewise without result, the Board representative stating that he had been unable to get the executives of the company to agree to meet with the Union (R. 879; 166, 171–172, 237).

Anderson also wrote to petitioner on August 2 (R. 848) asking for an immediate conference. Petitioner's answer (R. 849) announced the cancellation of the August 5 conference, and stated that no future time would be set until "we have a letter from you informing us as to whether or not this strike was instigated, ordered or approved by your Union, or any official or officials of your Union" (*id.*). Anderson did not reply, both because he had orally disclaimed responsibility, and because he was afraid a letter such as petitioner had requested would be used to alienate employees from the Union (R. 879; 219, 222, 232–233).

During the strike petitioner's hired guards ingratiated themselves with the pickets, buying them beer and lunches, and at the same time attempted to persuade them to call off the strike (R. 879–880; 320–321, 362–

363, 604–605). Healey himself told the pickets that the Union was no good and a "racketeer," and that petitioner would close up and move to Philadelphia before it would recognize the Union (R. 880; 246, 251–252). These intimidating and coercive statements were in plain violation of Section 8 (1) of the Act.*

On August 25 petitioner reopened the plant (R. 88, 520). On August 27 petitioner sent a letter (R. 850, 295) to each employee, requesting him to return to work on August 30, and stating that "all available means of protection" would be afforded. On the same day Healey, in reply to an anonymous telephone call, met one William McCann and two other employees in the Brooklyn Y. M. C. A. (R. 880; 525). The employees stated that they were anxious to return to work, and asked whether they could have their own committee and bargain with petitioner. Healey replied that if they could obtain the authorization of a majority of the employees petitioner "would be very happy to deal with" them (R. 880; 526–527).

A few days after he returned to work McCann again asked Healey about the procedure for getting together a collective bargaining committee. Healey told them he could not go into it, but to get a committee which

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* See *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 75, enforcing 1 N. L. R. B. 425, 430; *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8th); *National Labor Relations Board* v. *Lund*, 103 F. (2d) 815 (C. C. A. 8th); *Matter of Remington Rand, Inc.*, 2 N. L. R. B. 625, 626, 640, 653, 656, enforced *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d).

could be demonstrated to represent a majority of the employees (R. 880; 569). On September 9, McCann again came to Healey for assistance in drawing a letter of authorization which the employees could sign. Healey refused to help, but sent him to Sanford (R. 881; 576). Sanford then dictated the form (R. 866a), designating a committee of workers as the collective bargaining representatives of the workers, and revoking any authority to any other organization. This letter was circulated among the employees by McCann, and on September 9 was presented to Sanford and Healey with 110 signatures besides those of the members of the Committee (R. 881; 696; 866a).

Thus petitioner participated directly in the creation and promotion of the Committee. But even with less overt acts of sponsorship, the Committee could not be regarded as the free choice of the employees. Petitioner had shown unswerving opposition to an outside organization and a pronounced desire for an "inside" plan, and had driven its position home with flagrant unfair labor practices against the Union. An "inside" organization formed under these circumstances, as the Committee was, could not but be a response to petitioner's interference and the subject of its domination and support. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 268–271; *National Labor Relations Board* v. *Pacific Lines*, 303 U. S. 272, 274; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *National Labor Relations Board* v. *The Falk Corpora-*

tion, No. 460, this Term; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515; and cases cited *infra*, p. 26, n. 11.

The subsequent relations of the Committee with petitioner indicate its continued lack of independence. On September 10, the Committee sought to bargain with petitioner (R. 882; 580–581). No question was raised as to its authority to represent the employees (R. 882; 698). The Committee asked what could be done about wages, and Sanford read and explained to them a contract containing the same proposals that had been offered on July 20 and July 29 (*supra*, pp. 15–16, 17; R. 882; 581–582; cf. R. 702). The Committee's only requests related to pay for holidays and a reduction of the term of the contract from 5 to 3 years, which were accepted with modification (R. 882; 583–584, 586–587). The contract finally agreed to purports to be made between petitioner, the Committee, and "each and every one of the employees" of petitioner (R. 850).[9] Healey furnished copies of the agreements (mimeographed by petitioner, R. 688, 738) to the members of the Committee, telling them to "explain it, to the best of their ability" to the employees and giving explicit instructions as to the manner in which the agreements were to be executed (R. 586–587). Carmela Tesora, one of the returning employees, testified that Sanford in-

[9] The Board found (R. 884), and the lower court (R. 911–912) confirmed the finding, that the signing of the contracts was "a condition of reemployment" of the returning employees.

formed the employees that only those who signed would receive the five percent wage increase granted by the contracts or "protection" in their jobs (R. 375, 381).[19] Tesora's testimony was inferentially confirmed by Healey, who admitted that the wage increase was to be operative "From the signing of the contract that we were prepared to offer them * * *" (R. 582). The Board, upon the basis of this testimony and the inferences to be drawn from the conduct of petitioner described above, found that "The benefits of the contract under consideration were limited to those employees who signed" (R. 886), and that "the signatures to the contracts were procured by coercion and intimidation" (R. 892).

Several subsequent incidents reveal petitioner's domination of the Committee. For example, when Garone and 13 other employees returned to work, they asked the Committee if their group could have a representative upon the Committee. The Committee replied that they would have to see Sanford. The latter replied: "I am sorry, the committee has been picked already. There is enough right now on the committee" (R. 882–883; 761–764, 597). On another occasion Garone asked McCann, as a member of the Committee, to take up a grievance with the management. McCann refused, stating: "we cannot argue for you" (R. 883; 764–765). Sanford himself told several employees

[19] It was stipulated that three other witnesses then present in the hearing room would, if called upon to testify, have given the same testimony as Tesora (R. 386).

that they would not get the 5-percent increase and that he would not "protect" their jobs if they did not sign the individual contracts (R. 883; 375, 381).

The violations of the Act inherent in the making and execution of the contracts are dealt with in Point II, *infra*. In addition to these violations, however, the foregoing summary of the Board's findings and the evidence upon which they were based makes abundantly clear that the general challenge made by petitioner to the Board's findings and to the orders based thereon cannot be sustained. To recapitulate:

1. *The violation of Section 8 (2).* In considering the propriety of the Board's findings that petitioner interfered with and dominated the formation and administration of the Committee, one should bear in mind that the Committee was merely the end-result of a planned program of action—the Balleisen formula (*supra*, p. 18, n. 6)—expressly designed to make possible the establishment of such a company-dominated bargaining medium. Among the acts which made up this program are the following: the meetings called by Sanford following the first appearance of the Union, upon which occasions petitioner registered its disapproval of "outside" unions and its desire for an "inside" organization; the selection by petitioner of the first committee to convey its views to its employees; the petition sponsored by Dorsey to "supersede" the Union; the petitioner's active participation in the formation of the Committee; petitioner's domination of the sham "negotiations" with the Committee; the use of the Committee as an instrument in bringing about the execution

of the individual contracts; Sanford's determination of the personnel of the Committee, as indicated by his veto of the inclusion of a member of the Garone group. These actions, which for the most part stand unrefuted in the record, amply support the Board's finding of violation of Section 8 (2) of the Act."

2. *The violation of Section 8 (5).* The evidence supporting the Board's finding that petitioner refused to bargain collectively with the Union at the meetings of July 20 and 29, and thereafter during the strike, is

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"*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Pacific Lines*, 303 U. S. 272; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 20, this Term; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), cert. denied, 304 U. S. 576; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9th); *National Labor Relations Board* v. *J. Freezer & Son, Inc.*, 95 F. (2d) 840 (C. C. A. 4th); *National Labor Relations Board* v. *Wallace Mfg. Co.*, 95 F. (2d) 818 (C. C. A. 4th); *Virginia Ferry Corp.* v. *National Labor Relations Board*, 101 F. (2d) 103 (C. C. A. 4th); *Cudahy Packing Co.* v. *National Labor Relations Board*, 102 F. (2d) 745 (C. C. A. 8th), cert. denied, October 9, 1939; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3d); *Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87 (C. C. A. 10th); *National Labor Relations Board* v. *Calten*, 105 F. (2d) 179 (C. C. A. 6th); *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254 (C. C. A. 3d); certiorari denied, December 4, 1939; *National Labor Relations Board* v. *Griswold Mfg. Co.*, decided September 21, 1939 (C. C. A. 3d); *Republic Steel Corp.* v. *National Labor Relations Board*, decided November 8, 1939 (C. C. A. 3d); *National Labor Relations Board* v. *H. E. Fletcher Co.*, decided December 18, 1939 (C. C. A. 1st).

overwhelming (*supra*, pp. 17–21), and need not here be repeated. Petitioner does not even discuss the evidence upon which this finding is based, contending (Brief, p. 11) that any such discussion would be "futile" and "immaterial" because "on September 9, 1937 the employees had repudiated it (the Union) as their exclusive bargaining agent." The "repudiation" which petitioner asserts renders "immaterial" its clear violation of Section 8 (5), is the signing by the employees of the petition (*supra*, p. 22) which purported to designate the Collective Bargaining Committee and to revoke all prior designations of representatives. We have seen (*supra*, pp. 22–23) that the evidence amply supports the Board's finding (R. 892) that "the petition was drawn by the Company and circulated at its instance in order to effectuate the illegal acts of" petitioner. The Board was therefore fully warranted in ruling that "the petition has no significance as an expression of the employees' choice of an agency for collective bargaining" (R. 892).

Moreover, petitioner's contention is refuted by elementary considerations as to the character and purpose of company-dominated labor organizations. Such organizations are sponsored and supported by employers for the purpose of defeating their employees' freedom of choice in the selection of collective-bargaining representatives. It is a contradiction in terms to assert that employees can "voluntarily" choose to be represented by an organization whose existence and membership are attributable to the employer's illegal interference

and coercion, and which is merely an instrument of the employer's antiunion policy. The "choice" of such an organization cannot possibly be voluntary; it is, in fact, no choice at all. *National Labor Relations Board* v. *The Falk Corporation*, No. 460, this Term.[12]

Effectuation of the policies of the Act requires that the consequences of unfair labor practices be removed. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 20, this Term. Petitioner's contention, far from permitting violations of Section 8 (5) to be remedied, would encourage further unfair labor practices. The argument, in short, is that the consequences of a violation of Section 8 (5) of the Act may be evaded by the expedient of violating Section 8 (2). This Court should not give its approval to a result so damaging to the effectuation of the statutory purpose. See *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 570; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 869, 870 (C. C. A. 2d), cert. denied, 304 U. S. 576; *National Labor Relations Board* v. *Colton*, 105 F. (2d) 179, 181 (C. C. A. 6th); cf. *International Associ-*

[12] See *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270; *National Labor Relations Board* v. *Pacific Lines*, 303 U. S. 272, 275; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 262; *Newport News Shipbuilding & Dry Dock Co.* v. *National Labor Relations Board*, No. 20, this Term; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 233; *Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515.

ation of Machinists v. *National Labor Relations Board*, decided November 20, 1939 (App. D. C.).

3. *The violation of Section 8 (1).* The numerous violations of Section 8 (1) of the Act also stand plainly revealed—the preliminary interference by Sanford with the exercise by the employees of their right to select the Union as their bargaining representative, the first company-inspired but fruitless petition for an inside bargaining committee, the interference with the employees during the strike, as well as the other incidents described above. The cease and desist portions of the Board's order based upon these violations were consequently required by the Act (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265); and were properly ordered to be enforced by the court below (R. 914, 915).

II

PETITIONER WAS PROPERLY ORDERED TO DISCONTINUE ITS CONTRACTS WITH THE COMMITTEE AND WITH THE INDIVIDUAL EMPLOYEES

Subsequent to the reopening of the struck plant, petitioner engaged with the dominated committee in what it insists was "collective bargaining" (see pp. 23–24, *supra*). The result of the process was the execution of a series of identical written agreements. Each contract (Bd. Exh. 10, R. 850–857), although it purports to embody "the principles of collective bargaining in its fullest and truest sense" (R. 851), requires the signatures of the individual employee as well as of the Com-

mittee (R. 850, 857).[13] Copies of the contract were furnished to each employee and were signed in duplicate, one copy being retained by the employee, the other being returned to petitioner (R. 587, 589). Each instrument is entire and inseverable; it is not, as petitioner implies (Brief, pp. 28, 30) two distinct agreements, one between petitioner and the Collective Bargaining Committee, the other between petitioner and the individual employee. The "rights" and "duties" of the Committee and the individual employees, respectively, are not distinct and independent, but are completely intertwined. Thus, the "right" of an employee to participate in the contract is dependent upon his designation of the Committee as his collective bargaining representative (R. 851). Any changes in wages, facilities of employment, and hours can be negotiated only with the consent of the Committee (R. 855–856). The contract contemplates the joint participation of Committee and employees; a severance as to either would work the destruction of the instrument.

The contracts are not of an unfamiliar pattern. Contracts of very similar character, known as "Balleisen

[13] It should be noted that the issue is not whether an employer, guilty of no unfair labor practice, may lawfully enter into individual contracts of employment with such of his employees as freely choose to make such contracts, but whether the coercion and interference practiced by petitioner and the illegal terms which the contracts contain have rendered the contracts—whether they be deemed "individual" or "collective"—invalid. Assuming, *arguendo*, that an employer may under certain circumstances enter into individual contracts with his employees (cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45), it is self-evident that such contracts are as capable of being vitiated by unfair labor practices as are collective agreements.

contracts" (R. 57, 719–21), have engaged the attention of the Board and the courts in a number of cases. In every case, including the present, they have been condemned as violative of the Act.[14] Petitioner here, by paragraph 1 (c) of the order of the Board, is required to cease and desist from giving effect to its contracts with the Committee and the individual employees and by paragraph 2 (b) to inform in writing the Committee and each of its employees that the contract is violative of the Act and will no longer be enforced (R. 895–896). The essential direction to cease giving effect to the contracts is supportable both under the mandatory duty of

[14] *Court cases: National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2d); *National Labor Relations Board* v. *American Manufacturing Co.*, 106 F. (2d) 61 (C. C. A. 2d). *Board cases: Matter of Atlas Bag and Burlap Company, Inc.*, 1 N. L. R. B. 292; *Matter of Hopwood Retinning Co.*, 4 N. L. R. B. 922, aff'd, *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2d); *Matter of Cating Rope Works, Inc.*, 4 N. L. R. B. 1100, consent decree enforcing Board's order entered October 3, 1938 (C. C. A. 2d); *Matter of Metropolitan Engineering Company, Inc.*, 4 N. L. R. B. 542; *Matter of American Manufacturing Company*, 5 N. L. R. B. 413, aff'd, *National Labor Relations Board* v. *American Mfg. Company*, 106 F. (2d) 61 (C. C. A. 2d); *Matter of the Jacobs Bros. Company, Inc.*, 5 N. L. R. B. 620; *Matter of Federal Carton Corp.*, 5 N. L. R. B. 879, consent decree enforcing Board's order entered October 25, 1938 (C. C. A. 2d); *Matter of David E. Kennedy, Inc.*, 6 N. L. R. B. 699; *Matter of Art-Crayon Company, Inc.*, 7 N. L. R. B. 102; *In the Matter of Eastern Footwear Corp., etc.*, 8 N. L. R. B. 1245; *In the Matter of American Numbering Machine Co., etc.*, 10 N. L. R. B. 536; *In the Matter of Centre Brass Works, Inc., etc.*, 10 N. L. R. B. 1060; *In the Matter of Fanny Farmer Candy Shops, Inc., etc.*, 10 N. L. R. B. 288; *In the Matter of National Meter Co., etc.*, 11 N. L. R. B. 320.

the Board to require an employer to cease unfair labor practices (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265) and as an exercise of its power to direct such affirmative action as will effectuate the policies of the Act.

A. THE MANDATORY DUTY OF THE BOARD TO ENJOIN UNFAIR LABOR PRACTICES

1. *The contracts were part of petitioner's program of unfair labor practices*

Our summation of the evidence under Point I, *infra*, pp. 13–29, makes unnecessary a further description of the manner in which petitioner obtained the contracts from the Committee and the employees. As the Board found, the contracts were imposed by petitioner upon its employees through the instrumentality of the company-dominated Committee in order "to eliminate the Union as the collective bargaining agency of its employees" (R. 884, 890, 892). On these findings, the contracts were clearly illegal under the Act and fell by reason of such illegality. *Association of Rock Island, etc., Employees* v. *Lowden*, 15 F. Supp. 176, affirmed, 86 F. (2d) 458 (C. C. A. 10th), certiorari denied, 300 U. S. 659; *United States* v. *Reading Co.*, 226 U. S. 324; *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, 206; *Schenck* v. *United States*, 249 U. S. 47, 52; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 465–466. Orders of the Board requiring employees to cease giving effect to such con-

tracts have uniformly been enforced by the Circuit Courts of Appeals.[16]

2. *The terms of the contracts violate the Act*

Apart from their intimate connection with petitioner's campaign to destroy collective bargaining through the Union, the contracts impose illegal restraints upon the exercise by the employees of rights guaranteed in Section 7 of the Act. The critical portions of each contract are contained in paragraph SEVENTH, which reads as follows:

> Any Employee has the right to join any union of his own choosing or to refrain from joining any union. The Employees or any of them shall not and have not the right to demand a closed shop or a signed agreement by his Employer with any union. This does not in any way restrain the Employees from having a union representing them or advising them in collective bargaining, and the Employer has the absolute and unquali-

[16] *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2d); *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61 (C. C. A. 2d); *National Labor Relations Board* v. *Ronni Parfum, Inc.*, 104 F. (2d) 1017 (C. C. A. 2d), enforcing 8 N. L. R. B. 323; *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254 (C. C. A. 3d), certiorari denied, December 4, 1939, enforcing 5 N. L. R. B. 577, 596; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3d), certiorari denied, November 6, 1939; *National Labor Relations Board* v. *Eagle Mfg. Co.*, 99 F. (2d) 930 (C. C. A. 4th), enforcing 6 N. L. R. B. 492; *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8th); *National Labor Relations Board* v. *H. F. Fletcher Co.*, decided December 18, 1939 (C. C. A. 1st). See also *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652 (C. C. A. 9th); *International Association of Machinists* v. *National Labor Relations Board*, decided November 20, 1939 (App. D. C.).

fied right to hire or discharge any Employee or Employees for any reason and regardless of his or their affiliation or nonaffiliation with any union. It is mutually understood and agreed that the Employer will not discharge Employees because of legitimate union activities conducted outside of company time or company property or because of affiliation with any union. It is further mutually agreed and understood that the collective bargaining committee or the Employees will not intimidate or coerce employees and also will not solicit membership in any union on corporation time or plant property.

A discharged Employee may submit to the Employer facts indicating that his discharge was unreasonable, and the Employer may at its discretion reinstate said Employee, it being the intention of the Employer that Employees be not unjustly discharged. It is strictly understood and agreed, however, that the question as to the propriety of an Employee's discharge is in no event to be one for arbitration or mediation and that any action of reinstatement, if any, will be taken voluntarily by the Employer if it deems such reinstatement advisable.

It will be observed that this paragraph contains verbiage purporting to assure employees of their right to join or to be represented by a union. At the same time, the paragraph places such restraints upon the right of effective representation by a union that the "right" purportedly guaranteed becomes meaningless.

(a) The clause which requires the employees to agree not "to demand * * * a signed agreement by his Employer with any union" is vulnerable under the Act upon at least two counts. First, it is well estab-

lished that the fundamental purpose of collective bargaining negotiations is "the making of contracts with labor organizations." *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 236; *National Labor Relations Board* v. *Sands Mfg. Company,* 306 U. S. 332, 342. Such contracts, technically known as trade agreements, are almost invariably reduced to writing by the parties and signed, a practice which manifestly furthers the statutory objective of industrial peace by eliminating uncertainty as to the terms of the contract, by definitely establishing its binding character, and in other ways stabilizing the employer-employee relationship.[16] The provision of the present contracts which obligates the employees to re-

[16] The exceptional efficacy of the collective labor agreement in promoting peace in industry has been recognized by this Court. In *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 555, n. 7, the Court, citing the remarkable absence of labor strife in the railroad industry since the passage of the Railway Labor Act, stated as follows:

It is the belief of the National Mediation Board that peace in the railroad industry is largely due to the 3,485 collective agreements covering rates of pay, rules, and working conditions, which were filed by June 30, 1936 [see National Mediation Board, Second Annual Report for the Fiscal Year Ended June 30, 1936, p. 26]. In its First Annual Report for the Fiscal Year Ended June 30, 1935, it concluded (p. 36): "The absence of strikes in the railroad industry, particularly during the last two years when widespread strikes, the usual accompaniment of business recovery, prevailed throughout the country, is to be explained, primarily not by the mediation machinery of the Railway Labor Act, but by the existence of these collective labor contracts. For, while they are in existence, these contracts provide orderly, legal processes of settling all disputes as a substitute for strikes and industrial warfare.

That the "collective labor contracts" which are thus credited with responsibility for this excellent record are written agree-

nounce the right to demand "a signed agreement * * * with any union" makes impossible the attainment of this normal and desirable objective of collective bargaining. A second objection to the quoted provision of paragraph SEVENTH is its flagrantly discriminatory character. It will be observed that the provision does not eliminate signed contracts as such, but only signed contracts "with any *union.*" Since the Congressional objective in encouraging the "practice and procedure of collective bargaining" was to promote "the making of contracts with *labor organizations,*"[17] not with company-dominated collective bargaining committees or, through them, with individual employees, it is obvious that the quoted provision of paragraph SEVENTH is in conflict with the public policy of the Act. See the *Consolidated Edison* case, *supra,* at 236. Furthermore, the inevitable effect of such discrimination is to impress the employees with petitioner's hostility toward labor unions and to warn them that if they choose a union—and only if they choose a union—to represent them in collective bargaining, their representative will be denied the important privilege of embodying the fruits of collective bargaining in a signed agreement. The evident effect of such a tactic is to lessen the value to the employees of union mem-

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ments is shown by the fact that the Railway Labor Act requires all carriers to file "a *copy* of each contract with its employees" with the National Mediation Board (Sec. 5, Third (e), Railway Labor Act of 1934, c. 691, 48 Stat. 1185, 45 U. S. C. § 155). See *First Annual Report of the National Mediation Board* (Govt. Printing Office, Wash., D. C.), pp. 32–36.

[17] Italics ours.

bership, impair the prestige of the union among the men, and discourage membership in the Union and other bona fide labor organizations.

(b) Paragraph SEVENTH further violates the Act in its provisions with respect to the right of employees to protest against discrimination in hire or discharge. The contract gives petitioner "the absolute and unqualified right to hire or discharge any Employee or Employees for any reason and regardless of his or their affiliation or non-affiliation with any union" (R. 854). It is true that this language is followed by the statement:

> It is mutually understood and agreed that the Employer will not discharge employees because of legitimate union activities conducted outside of company time or property, or because of affiliation with any union (R. 854).

We need not consider whether this proviso coincides with the rights of employees under the Act. The "guarantee" is rendered meaningless by the ensuing paragraph:

> *A discharged employee* may submit to the employer facts indicating that his discharge was unreasonable, and the Employer may *at its discretion* reinstate said Employee * * *. It is strictly understood and agreed, however, that *the question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation* and that any action of reinstatement, if any, will be taken voluntarily by the employer, if it deems such reinstatement advisable (R. 855). [Italics added.]

The court below, in its opinion, said of this provision of the contract: "It may perhaps be read as not meant to forbid negotiations regarding discharges; but only to eliminate the remedies mentioned. Even so 'mediation' is close to 'negotiation', and the preceding declaration that a discharged workman may put his case personally before the company suggests that the company union shall not act for him" (R. 911). We add that, in our opinion, the provision shows a clear purpose, not only that "the company union" shall be barred from protesting an employee's improper discharge, but that the question of the propriety of a discharge shall not be raised through representatives at all, but only by the affected employee himself. Petitioner's argument, advanced at page 37 of its brief, that "the right of a discharged employee to submit to the employer facts indicating that his discharge was unreasonable is expressly secured by Section 9 (a) of the Act" furnishes support for this construction. It may be conceded that under Section 9 (a) an employee who has been discriminatorily discharged *may*, if he chooses, himself present his grievance to the employer. But it cannot be thought that Section 9 (a) decrees that such direct dealing shall constitute the exclusive method of presenting a grievance of this character, and thus prohibits the aggrieved employee from seeking redress through the intermediacy of his chosen representatives. The discriminatory discharge of an active union member is not confined in its effect to the employee discharged, but operates as a threat to the liberty of action of all employees susceptible of similar discrimination,

and tends to discourage membership in unions generally. *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 18, 23 (C. C. A. 9th). The right of employees to seek redress against such discharges through their collective bargaining representatives is a part of the right "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" (Section 7 of the Act).

(c) Another illegal aspect of the contract is the requirement that the employees pledge themselves not to "demand" a closed-shop or a signed agreement. The argument may best be stated in the language of the court below:

> It is indeed lawful for a union to agree to an open shop; but it is another thing to agree not to propose changing to a closed shop for the period of the agreement, and the word, "demand", covered a proposal. The same is true of the stipulation not to "demand" a signed agreement. A party to a contract does not break it, when he proposes to the other party that conditions have so far changed as to make desirable a change of the contract. * * * the right to propose the change is secured by statute as part of the right to negotiate (R. 911).

Petitioner challenges these conclusions, urging, in effect, that a labor agreement, once made, may not be altered by negotiation of the parties "for the duration of [the] agreement" (Brief p. 38). This contention is foreclosed, however, by the express declaration of this Court in *National Labor Relations Board* v. *Sands Mfg. Company*, 306 U. S. 332, 342, that "the Act im-

poses upon the employer the further obligation to meet and bargain with his employes' representatives *respecting proposed changes of an existing contract . . .*" (Italics added.) In addition, we need only point out that the logic of petitioner's argument would permit an employer to obtain from his employees a promise *never* to seek a change in the terms of a wage agreement, or else to seek no change for a period of time sufficiently long to result in the effectual nullification of the right of collective bargaining. A construction of the Act which would enable employers to prohibit their employees from proposing mutual revision of the terms of a contract which has become unworkable or inequitable would lead, not to "allaying disputes and harmonizing labor relationships," as petitioner imagines (Brief p. 38), but to the unrest and dissatisfaction which expresses itself in strikes, boycotts, and other disruptive methods of attempted alteration of the industrial *status quo*. Particularly is this true of a contract, such as the present one, having a term of three years.

(d) Petitioner (Brief pp. 44–45) would justify the restraints on self-organization and collective bargaining embodied in these contracts by reliance upon the alleged right of employees to "waive" the guarantees of the Act. The short answer to this contention is that the "negotiations" for the contract were conducted through the instrumentality of the company-dominated Committee (*supra*, pp. 23–24). "Collective bargaining is reduced to a sham when the employer sits on both sides of the table by supporting a particular organization

with which he deals".[18] An agreement reached through such a process cannot be regarded as a voluntary expression of the employees' intentions. It would nullify the purposes of the Act to permit an employer thus to force his employees to waive rights intended to prevent employer interference.

Equally conclusive is the fact that the provisions of Section 7 of the Act, protecting the right to self-organization and collective bargaining, are not susceptible of being "waived" by employees. The Act is an exercise of public authority directed to the accomplishment of an important national objective—the protection of the channels of interstate commerce against strikes and other obstructions. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1.[19] The right of employees to self-organization and collective bargaining is the keystone of the structure. The contention that the right may be waived is derived from a misapprehension of the objectives of the Act. No one may "waive" a right which has been granted, not as a personal privilege, but in furtherance of a valid public policy. See *Grandview*

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[18] House Report No. 1147, 74th Cong., 1st Sess., p. 18.

[19] "No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential * * *." House Report No. 1147, 74th Cong., 1st Sess., p. 24.

See also *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146, 150 (C. C. A. 5th); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179 (C. C. A. 6th); *Blankenship* v. *Kurfman*, 96 F. (2d) 450, 454 (C. C. A. 7th). Compare *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25.

Inland Fruit Co. v. *Hartford Fire Ins. Co.*, 66 P. (2d) 827, 834, 189 Wash. 590, 109 A. L. R. 1472; *Day* v. *McAllister*, 15 Grey (Mass.) 433, 434. Compare *Doherty* v. *Bartlett*, 81 F. (2d) 920, 926 (C. C. A. 1st).

The conclusion is inevitable that the contracts were invalid on their face because the conditions they impose violate the Act. As a consequence, the Board was under a mandatory duty to require petitioner to cease and desist from continuing to violate the Act by giving effect to them. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265. Compare *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2d).

B. THE POWER OF THE BOARD TO ORDER AFFIRMATIVE ACTION TO EFFECTUATE THE POLICIES OF THE ACT

The order is likewise valid as an appropriate exercise of the Board's power under Section 10 (c) to require such affirmative action as will effectuate the policies of the Act. The record in the present case supports each finding which this Court in the *Consolidated Edison* decision, 305 U. S. 197, 236, indicated would furnish a basis for an order to set aside employment contracts.

1. The contracts in question here were a consequence of unfair labor practices on the part of petitioner. The Board found specifically that the contracts were made through the instrumentality of a labor organization dominated by petitioner in violation of Section 8 (2) (R. 892); that the company-dominated Committee was used by petitioner "to obtain the signatures of the employees to the individual contracts" (R. 884);

and that the contracts were imposed upon the employees by petitioner in order "to eliminate the Union as the collective bargaining agency of its employees" (R. 890). These findings, which were approved by the court below (R. 910, 911–912), are fully supported by the evidence (*supra*, pp. 21–25). Orders of the Board requiring the termination of contracts similar to the present ones, made with or through the instrumentality of company-dominated labor organizations, have without exception been upheld by the Circuit Courts of Appeals.[20]

2. The second criterion is likewise clearly met. We need not again enumerate the respects in which, in the words of the Board's finding, "the limitations on union activity imposed by the contracts interfered with, restrained and coerced" petitioner's employees "in the exercise of their rights to self-organization and collective bargaining" (R. 892, 886–887). A failure to terminate these illegal restraints will seriously "thwart" the policies of the Act.

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[20] *National Labor Relations Board* v. *H. E. Fletcher Co.*, decided December 18, 1939 (C. C. A. 1st); *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97 (C. C. A. 2d); *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61 (C. C. A. 2d); *National Labor Relations Board* v. *Ronni Parfum, Inc.*, 104 F. (2d) 1017 (C. C. A. 2d), enforcing 8 N. L. R. B. 323; *Titan Metal Mfg. Company* v. *National Labor Relations Board*, 106 F. (2d) 254 (C. C. A. 3d), certiorari denied, December 4, 1939, enforcing 5 N. L. R. B. 577, 596; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167 (C. C. A. 3d), certiorari denied, November 6, 1939; *National Labor Relations Board* v. *Eagle Mfg. Co.*, 99 F. (2d) 930 (C. C. A. 4th), enforcing 6 N. L. R. B. 492; *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F. (2d) 49 (C. C. A. 8th).

3. The discontinuance of the contracts is necessary, moreover, in order to make effective the order to cease the unfair labor practices. If petitioner is allowed to continue its observance of the contracts it cannot cease and desist from "dominating or interfering with * * * and from contributing * * * support to" the Committee (R. 894), since the recognition granted in the contract is a powerful continuing form of interference and support. The *Pennsylvania Greyhound case*, 303 U. S. at 267, 271; see *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 20, this Term. This conclusion applies with equal force to the provision explicitly requiring petitioner to cease and desist from "recognizing" the Committee "as the representative of any of the employees for the purpose of dealing with" petitioner concerning employment matters (R. 895).

Similarly, a failure to set aside the contracts, both in their "individual" and "collective" aspects, will render wholly unenforceable that provision of the order which requires petitioner to cease "refusing to bargain collectively" with the Union "as the exclusive representative of its production employees at its Brooklyn, New York, plant" (R. 895). Obviously, petitioner cannot recognize and treat with both the Committee and the Union. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 44–45.

Finally, the continuance of the illegal limitations on union activity which the contracts contain (*supra*, pp. 33–42) would nullify that portion of the order which commands petitioner to cease from "interfering with,

restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7" of the Act (R. 895). We submit, therefore, that not only will the invalidation of the present contracts make the order to cease and desist more effective, but that unless the contracts are terminated the entire order of the Board will be rendered nugatory.

III

THE ORDER TO DISCONTINUE THE CONTRACTS DID NOT VIOLATE THE FIFTH AMENDMENT

Petitioner asserts (Pet. for Certiorari, pp. 8–9, 12; Brief, pp. 27–33, 45–50) that it was deprived of due process of law with respect to the order directing it to discontinue the contracts in that (1) counsel for the Board stipulated that the contracts were not in issue, and (2) no notice and hearing was afforded to the Committee or the individual employees.

1. The conclusive answer to the first contention is, simply, that there was no such stipulation. The portion of the record containing the alleged "stipulation" is as follows (R. 380–381; Mr. Mann was attorney for petitioner; Mr. Sklar was attorney for the Union; Mr. Graham was attorney for the Board):

> Q. (By Mr. Mann.) Miss Tesoro, the amended charge says that the National Licorice Company

has by means of threats and intimidations, coerced, and attempted to coerce its employees into signing individual contracts. In the first place, do you understand what those words mean, that I just read?—A. No.

Q. Well, "coerce" means to force.

* * * * *

Q. (By Mr. Mann.) "Intimidate" means about the same as threats. Did anybody threaten you or force you to sign this contract?—A. No.

Mr. SKLAR. Objected to, Mr. Examiner, on the ground that this charge applied to August 2nd and has nothing to do with the contract of September 20th.

Mr. MANN. It talks about individual contracts, and they offered in evidence a contract.

Mr. SKLAR. Those contracts referred to are the ones mentioned by Mr. Sanford on July 29th.

Mr. GRAHAM. In order to get the right effect, we are going to let these in. Complaint embodies none of these contracts.

Mr. MANN. May I ask on the record whether they want to go into this question of contracts under their amended charge. If not, let's forget about it.

(482) Trial Examiner KOREY. I have ruled you can ask the question. Please continue.

Q. (By Mr. MANN.) Were you, Miss Tesoro, forced or threatened to sign the contract which you say you signed on September 20th, a copy of which has been offered as Board's exhibit 10 for identification?—A. No.

Mr. MANN. That is all.

Petitioner relies entirely upon the remark of Mr. Graham, the Board counsel, that "Complaint embodies none of these contracts." There is nothing mysterious about the meaning of this remark in its context. The complaint did not *physically* embody either the contracts which Sanford unsuccessfully sought to impose upon the employees during the conference of July 29th (R. 380, 50, 54, 96, 105, 145, 150) or the contracts which petitioner succeeded in making with the Committee and its employees on or about September 20th (R. 586–587, 372–382; Bd. Exh. 10, R. 850). Any construction of the term "embodies" as the equivalent of "mentions" rather than "physically exhibits" requires the improbable assumption that counsel for the Board was unacquainted with the allegations of the complaint (R. 777, 778–779). Mr. Graham was seeking to end the ntroversy between counsel for the petitioner and counsel for the Union as to which of the two groups of contracts was in issue (R. 378–381) by pointing out that the contracts of September 20th were the ones whose validity was challenged.[21] Hence his statement: "In order to get the right effect, we are going to let these in" (R. 381). "These," as Mr. Mann's following question to the witness shows, were the contracts of September 20th (Bd. Exh. 10, R. 850). Clearly there was no concession that the contract issue was removed from the case.

[21] It is clear that the contracts referred to in the complaint were those of September 20th. The earlier contracts had been merely *proposed* by the petitioner. Only the later contracts could have been "signed" by the employees or made a "condition of employment" as the complaint alleged (R. 777).

Moreover, petitioner's counsel immediately called for an interpretation of Mr. Graham's remark, and was told by the Trial Examiner that he could continue his line of questioning designed to prove that the contracts of September 20th were valid, as petitioner had expressly alleged in its answer (R. 794–795). In addition, at the completion of the Board's case, and subsequent to the colloquy described above, counsel for petitioner orally presented a motion to dismiss the complaint (R. 395–431) during the course of which he discussed at some length the provision of paragraph 7 of the complaint relating to the signing of individual contracts (R. 423–425). There is not a word suggesting that counsel believed the contracts were not in issue. Finally, petitioner's counsel himself *thereafter* called Healey, an officer of the petitioner, to prove the validity of the contracts. It is not reasonable to suppose that either counsel would have examined (R. 581–604) and cross-examined (R. 696–711) Healey at length as to the terms and manner of making of the contracts if their validity was not at issue in the case. The conclusion is irresistible that petitioner was not in fact misled.

A further answer to the contention is that petitioner urged it at no time prior to the initiation of enforcement proceedings in the Circuit Court of Appeals. Section 10 (e) of the Act forbids any consideration by the courts of an objection that has not been urged before the Board, unless the failure to raise such objection is excused because of "extraordinary circumstances." Petitioner has offered no excuse whatever for its neglect to urge its contention before the Board.

2. Petitioner's second contention (Brief pp. 27–33) is that the lack of notice to the Committee and to the individual employees is fatal to the validity of the order directing it to discontinue the contracts. The precise nature of this objection should be noted at the outset. Petitioner does not—and cannot—assert that it did not receive notice and hearing on this issue, but complains only of the failure to afford such notice and hearing to the Committee and to the individual employees (Pet. for Cert., p. 8; Brief pp. 27–33.)[22] The complaint and the answer, both filed prior to the commencement of the hearing, clearly put the validity of the contracts in issue[23] and the question was fully liti-

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[22] The alleged deficiency of the "charge," discussed under Point IV, *infra*, pp. 64–72, is not urged as a denial of notice and hearing and is not relevant to this issue. It is asserted as a defect of "jurisdiction" of the Board arising from omission to have a formal amendment made to the charge (Pet. Brief, pp. 20–24).

[23] The complaint alleged that petitioner "has made signing of individual contracts a condition of employment" (R. 777) and that by such and other acts petitioner "did interfere with, restrain, and coerce and is interfering with, restraining, and coercing its employees in the rights guaranteed in Section 7 of said Act, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8, subdivision (1) of said Act" (R. 779). Petitioner's answer, filed the day on which the hearing commenced (R. 16, 798), alleged that "the respondent [petitioner here], in strict conformance and compliance with the provisions of the National Labor Relations Act, did confer and bargain with the committee duly designated by the workers, as a result of which it has actually negotiated and agreed with its employees with reference to wages, hours, and conditions of employment, which said terms of the agreement reached have been embodied in written contracts duly and properly signed and executed by the respondent, and collective bargaining committee, and the employees of the respondent, who have indicated their

gated by the petitioner and the Board (R. 372–382, 396, 581–604, 696–711, 823, 835). The contention that the omission of notice and hearing to others invalidates the order against petitioner is unsound for numerous reasons.

(a) The present case is governed by the decision of this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271. Accord: *National Labor Relations Board* v. *Pacific Lines*, 303 U. S. 272. The issue in the *Greyhound* case was whether the employer had created and fostered a certain "inside" labor organization of its employees and dominated its administration in violation of Section 8 (1) and (2) of the Act. The Board, after finding that such violations had occurred, ordered the employer to cease and desist from those practices and, in addition, completely to disestablish the organization as collective bargaining representative of the employees. The Circuit Court of Appeals for the Third Circuit set aside the Board's disestablishment order on the ground that the employee association should have been given opportunity to participate in the proceeding (91 F. (2d) 178, 179 (C. C. A. 3d)). This Court reversed and granted enforcement in full of the order of the Board, specifically holding that (303 U. S. at 271)—

> As the order did not run against the Association it is not entitled to notice and hearing. Its

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approval and consent to, and ratification of such contracts (R. 794–795. * * * That such contracts are in full force and effect, and all of the parties thereto are operating thereunder, pursuant to its terms and provisions, in strict accordance with the terms of the National Labor Relations Act" (R. 795).

presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them.

The present Collective Bargaining Committee, like the "inside" association in the *Greyhound* case, was found upon ample evidence to have been initiated, sponsored, and dominated by petitioner in violation of Section 8 (1) and (2) of the Act. In this case, likewise, the petitioner was ordered by the Board to cease recognizing and completely disestablish the Committee as the representative of any of its employees (R. 895–896). Petitioner concedes (Brief, p. 28) that under the rule of the *Greyhound* case the Board may properly issue such an order without notice to the labor organization. It insists, however, that the rule does not apply where, as here, "recognition" is embodied in a contract (R. 850, 851, 855–856, 857). We submit that there is no justification for distinguishing between the two forms of recognition so far as the Board's power to order disestablishment is concerned.

It is a mistake to assume, as the petitioner apparently does, that the interest of the Association which was affected by the order in the *Greyhound* case differs from that of the Committee in the present case. A union's primary interest, affected equally by the order in each case, is its claim to recognition as the representative of the employees in collective bargaining with the employer. Recognition is the pivotal factor in collective bargaining. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548; *Virgin-*

ian Railway Co. v. *System Federation No. 40,* 300 U. S. 515. Without recognition of a bargaining agency collective bargaining cannot take place. The most valuable asset that a union can have, therefore, is the employer's recognition of it as the bargaining agency of its employees. The basic significance of recognition in collective bargaining has been evidenced by the willingness of this Court, in a proper case, to protect the right thereto by injunction. *Virginian Railway Co.* v. *System Federation No. 40, supra; Texas & N. O. R. Co.* v. *Brotherhood of Railway Clerks, supra,* at 571.[24] The employer may confer recognition on a union by written contract or by tacit agreement. The form in which recognition is embodied does not change its vital significance to the union and should not be permitted to obscure the effect on the union of an order to cease recognition and to disestablish the union as the bargaining agency.[25] It is unrealistic to contend that the order of the Board affects substantial interests of the union

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[24] See also Commons, John R., and Andrews, John B., *Principles of Labor Legislation* (Harper & Bros., 4th Ed., 1936), p. 372; Catlin, W. B., *The Labor Problem* (Harper & Bros., 1926), pp. 317, 327; Rufener, L. A., *Principles of Economics* (Houghton-Mifflin Co., 1927), p. 399; Twentieth Century Fund, Inc., *Labor and Government,* (1935), p. 47; Yoder, Dale, *Labor Economics and Labor Problems* (1933), p. 433; U. S. Department of Labor, Bureau of Labor Statistics, *Characteristics of Company Claims,* Bulletin No. 634, Chs. VII, XXII.

[25] We do not mean to minimize the value to a *bona fide* union of having recognition embodied in a written contract. The necessity for written recognition usually arises because of the employer's expressed or latent hostility to the union. Obviously, there is no such necessity where the union is dominated by the employer.

where recognition is granted by contract but does not where recognition is noncontractual.

The order in this case to discontinue the contracts is necessary, as we have seen (*supra*, pp. 42–45), to effectuate the complete disestablishment of the Committee and to remove the consequences of petitioner's unfair practices. Plainly, the discontinuance of the contracts is "the only effective way of wiping the slate clean and affording the employees an opportunity to start afresh in organizing for the adjustment of their relations with the employer." *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 20, this Term, p. 7. The Circuit Courts of Appeals, without exception, have enforced such orders, as did the court below, and have repudiated the distinction which petitioner seeks to make. Following the *Greyhound* decision, they have upheld Board orders to discontinue contracts conferring recognition on company-dominated labor organizations and perpetuating unfair practices of employers despite the absence of notice to those organizations or the employees. *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97, 99, 100 (C. C. A. 2d), enforcing 4 N. L. R. B. 922, 944; *National Labor Relations Board* v. *Ronni Parfum, Inc.*, 104 F. (2d) 1017 (C. C. A. 2d) enforcing 8 N. L. R. B. 323, 334; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 169 (C. C. A. 3d), certiorari denied November 6, 1939, enforcing 6 N. L. R. B. 171, 203; *Titan Metal Mfg. Co.* v. *National Labor Relations Board*, 106 F. (2d) 254 (C. C. A. 3d), certiorari denied December 4, 1939, enforcing 5 N. L. R. B. 577,

597; *National Labor Relations Board* v. *Eagle Mfg. Company*, 99 F. (2d) 930 (C. C. A. 4th), enforcing 6 N. L. R. B. 492, 507.

(b) The procedure followed by the Board in this case and approved in the *Greyhound* decision complies fully with the requirements of notice and hearing set up by Congress. The Act requires a complaint to be served only upon persons charged with engaging in unfair labor practices (Section 10 (b)). Only employers can be found to have engaged in such practices (Section 8), and a labor organization is expressly declared not to be an employer (Section 2 (2)). Accordingly, under the Act only employers are required to be notified or joined as parties. It is only upon employers that an order of the Board can impose any enforceable obligation.

The omission of a requirement of notice to persons other than employers, such as the Committee or the individual employees, who might indirectly be affected by the orders of the Board, cannot be thought inadvertent. The rights of others are protected under the statute (1) by provision for intervention before the Board, and (2) by the right to challenge the order in the Circuit Court of Appeals. Thus, the Committee or the employees could have sought permission to intervene in the proceedings before the Board under Section 10 (b) of the Act. After the Board's order was issued, and whether or not either had previously intervened before the Board, the Committee or the employees might have filed a petition for review of the order, as a "person aggrieved," in the Circuit Court of Appeals under Section 10 (f). If after filing such a petition the Com-

mittee or the employees had desired further hearings on the facts, they could have petitioned the court for leave to adduce additional evidence (Sections 10 (e) and 10 (f)). These provisions of the Act are comprehensive. They preclude any inference that the presence of the Committee or the individual employees was affirmatively necessary to the Board's jurisdiction to issue the order here in question. They suggest that Congress definitely intended to exclude any requirement of notice to persons other than employers.

(c) No question of the constitutional adequacy of the statutory procedure, as applied to the Committee and the individual employees, is before this Court or was before the court below. Petitioner was afforded notice and full hearing on the issue of the validity of the contracts. It could not complain that the Board's order, pursuant to the statute, infringed rights of the Committee or the individual employees under the statute, even if the order did so. The employer "can complain only of the infringement of its own constitutional immunity, not that of its employees." *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 558, and cases there cited. The rule is equally applicable to a claim that notice and hearing has been denied. *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544; *Tyler* v. *Judges,* 179 U. S. 405, 409–410. Compare *Aikins* v. *Kingsbury,* 247 U. S. 484, 489; *Straus* v. *Foxworth,* 231 U. S. 162, 170–171.[26]

[26] The risk to petitioner of a multiplicity of suits (Pet. Brief, pp. 49–50), if it exists, cannot seriously be regarded as a denial of due process. Compare *Worcester County Co.* v. *Riley,* 302 U. S. 292, 299, and cases there cited. The contention is refuted by

(d) Even if a constitutional objection had been properly raised, the statutory procedure appears clearly to be adequate constitutionally to support the order in question. The Board proceeding was brought to vindicate the rights of the Government, not those of private parties,[27] and the order neither imposes nor purports to impose any enforceable obligation upon the Committee or the individual employees. The opinion in the *Greyhound* case, 303 U. S. 261, 271, plainly disposes of the contention that the Committee or the employees were entitled to notice and hearing. The order did not run against them and their presence was not necessary in order to determine whether the petitioner had violated the statute or to make an appropriate order against it (303 U. S. at 271).

Petitioner (Brief, pp. 27–33) refers to the equitable rule of indispensable parties. That rule, of course, expresses a principle of administration of courts

innumerable cases denying interpleader to a stakeholder faced with inconsistent claims. See Chafee, *Interpleader in the United States Courts* (1932), 41 Yale L. J. 1134, (1933) 42 Yale L. J. 41. Furthermore, the argument that such a risk exists, if sound, completely answers petitioner's contention (Brief, pp. 30–33, 50) that the Committee and the employees are, in the equitable sense, "indispensable." An absent party is not indispensable to a proceeding which leaves open the effective assertion and protection of his rights. *Roos* v. *Texas Co.*, 23 F. (2d) 171, 172 (C. C. A. (2d)), and cases there cited.

[27] *Agwilines, Inc.* v. *National Labor Relations Board*, 87 F. (2d) 146 (C. C. A. 5th); *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179 (C. C. A. 6th); *Blankenship* v. *Kurfman*, 96 F. (2d) 450 (C. C. A. 7th); of *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 266–267. "No private right of action is contemplated." House of Representatives Committee on Labor, Report No. 1147, p. 24.

of equity (*Elmendorf* v. *Taylor*, 10 Wheat. 152, 166–167) and not a requisite of due process (*McCaughey* v. *Lyall*, 224 U. S. 558; compare *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 233). Numerous decisions by courts of equity, moreover, are persuasive of the validity of the statutory procedure. Thus, in both the *Texas & New Orleans* case, 281 U. S. 548, and the *Virginian Railway* case, 300 U. S. 515, recognition was ordered withdrawn—expressly in the first case and by necessary effect in the second—from company-dominated unions who were not parties to the suits. Similarly, in *General Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 283, 285–286, the Court held that one of certain railroads which had contracted to submit to their stockholders an agreement for consolidation was not an indispensable party in a suit to enjoin another of the contracting parties from consummating the consolidation. Again, equity courts have frequently declared contracts invalid, or prohibited their making in the future, in suits to which only one of the parties was a respondent. E. g., *Paramount Famous Corp. v. United States*, 282 U. S. 30; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 456; *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910 (C. C. A. 2d). See also *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110–111.[28] The present order, directed solely

[28] There are numerous cases enjoining a defendant from doing what an absent person not a party to the suit has contracted with him that he may do. *New York Phonograph Co.* v. *Jones*, 123 Fed. 197 (C. C., S. D. N. Y.); *E. L. Husting Co.* v. *Coca Cola Co.*, 194 Wis. 311, 216 N. W. 833, rehearing denied, 205 Wis. 375, 238

against the petitioner, and based on issues relating only to the conduct of petitioner, seems to be well within the analogous authorities.

(e) The *Consolidated Edison* case, 305 U. S. 197, upon which petitioner relies (Brief, pp. 28–30), was concerned with a wholly different situation. In the opinion of the Court, there was no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that the contracts in themselves thwarted any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective (305 U. S. at 236). The difference between the *Consolidated Edison* and the *Greyhound* cases is apparent.

The *Greyhound* case, 303 U. S. 261, shows that the Government may try the issue whether unfair labor practices have been committed between itself and the employer and, upon a determination against the employer, may order him to take whatever steps are appropriate to prevent the recurrence of the unfair practices. The fact that third parties may be substantially affected by the order against the employer does not make their presence necessary in order to enable the Board to determine whether the employer has violated the statute or to make an appropriate order against

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N. W. 626, certiorari denied, 285 U. S. 538; *NeKol Co.* v. *Becker*, 318 Mo. 292, 300 S. W. 1108; *Alcazar Amusement Co.* v. *Mudd & Calley Amusement Co.*, 204 Ala. 509, 86 So. 209; *Meyer* v. *Washington Times Co.*, 76 F. (2d) 988 (App. D. C.), certiorari denied, 295 U. S. 734. See *Fidelity & Deposit Co.* v. *State of Montana*, 92 F. (2d) 693, 698 (C. C. A. 9th).

him (303 U. S. at 271). The *Consolidated Edison* opinion nowhere suggests that persons other than employers are necessary parties to the determination whether an employer has violated the rules of conduct laid down in the Act. The opinion suggests, merely, that the substantial interests of persons who have not been given notice and hearing may not be affected by an order not shown by the record to be appropriate or essential to remedying unfair labor practices.

This construction of the *Consolidated Edison* case is supported, we submit, by the language of the Court. The opinion expressly distinguishes the *Greyhound* case on the ground that the Association there in question was found upon evidence to have been created and fostered and dominated in its administration by the employer in violation of Section 8 (2) (305 U. S. at 233). This ground of distinction shows that the Court did not intend in the *Consolidated Edison* case to decide that anyone other than the employer is a necessary party in order for the Board to determine whether the employer has committed unfair labor practices. The Association in the *Greyhound* case could not be determined to be company-dominated until after the evidence was taken and the findings made by the Board. The explanation is that domination by an employer is an unfair labor practice and that issue is triable only between the Government and the employer (303 U. S. at 271).

The continuation of the contracts in the *Consolidated Edison* case was not, under the decision of the Court, an unfair labor practice. The contracts did not confer recognition on a company-dominated labor organiza-

tion, nor were they regarded by the Court as a consequence of the unfair practices of the employer or as in themselves thwarting any policy of the Act (303 U. S. at 232, 236). On the basis of these conclusions the order to desist from enforcing the contracts could not be considered as required by the mandatory duty of the Board to prevent unfair labor practices (see 303 U. S. at 265). The order still might have been upheld without a requirement of notice and hearing to others if it was necessary to make the command to desist from the other unfair labor practices effective (cf. 303 U. S. at 271), but the Court held that there was no basis for such a finding (305 U. S. at 236). Hence, in the opinion of the Court, the order to desist from enforcing the contracts bore so little relation to remedying the unfair practices of the employer that notice and hearing to others who were substantially affected by the order was required (305 U. S. at 233).[29] Had the order been supportable, in the view of the Court, as an essential step in preventing unfair labor practices by the employer, the *Greyhound* rule would have applied and the fact that others were indirectly affected by the order against the employer would have been immaterial (303 U. S. at 271).

The order in question here, as we have indicated (*supra*, pp. 50–54), is clearly covered by the rule in the *Greyhound* case. The validity of the contracts was put in issue and was fully litigated (*supra*, pp. 49–50).

[29] The Court's determination that, under the circumstances, the validity of the contracts should have been, but was not, placed in issue and litigated was an independent ground sufficient to support the refusal to enforce the order in the *Consolidated Edison* case (see 305 U. S. at 234–235, 238).

The only issue necessary to the determination whether an order to cease enforcing the contracts should issue was whether petitioner's enforcement of them was an unfair labor practice. That issue was triable only between the Government and the employer. Upon the Board's finding against the petitioner, the order to discontinue the contracts was mandatory under Section 10 (c). The *Greyhound* case, 303 U. S. at 265. In addition, the order to discontinue the contracts was essential to make effective the other provisions of the Board's order, in particular, the direction to withdraw recognition from and to disestablish the company-dominated Committee (*supra*, pp. 42–45). The order is plainly remedial, and not "punitive," in character and is directed solely against petitioner. Under these circumstances, there is no occasion for joining as parties anyone other than petitioner. Surely no one else should be permitted to urge that conduct of the petitioner in violation of the rights of the public must be permitted to continue merely because he has an interest in it. The *Greyhound* case, 303 U. S. 261, 271, plainly refutes such a contention. The argument comes with even less grace when advanced by the petitioner.

(f) Petitioner urges (Brief, pp. 30–33, 50) that the equitable rule of indispensable parties prevents enforcement of the order in question here. We submit that there is no merit in the claim. In the first place, there is no clear indication in the authorities that the equitable rule of indispensable parties is applicable to a suit by the Government to enjoin the continuance of activity in violation of public rights. We have found no decision of the Court refusing such relief at the suit

of the Government merely on the ground that an absent party had an interest in the illegal activity. There are several cases in which such relief has been granted despite the absence of parties vitally concerned in the result of the proceeding. The *Greyhound* case, 303 U. S. 261; *Paramount Famous Corp.* v. *United States*, 282 U. S. 30; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 456. See *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 411, 451, 453.[30] The *Consolidated Edison* case is not an exception to this line of authorities. The direction there refused enforcement was regarded as in no way making the command enjoining the unlawful activity more effective (305 U. S. at 236). Such an established practice of enjoining illegal activity without insisting strictly upon observance of the equitable rule of indispensable parties is not without significance. It is expressive of a doubt whether rules developed to aid the Chancellor to do complete justice among private litigants are fully applicable in proceedings by the Government to vindicate the public interest. The public character of the rights enforced in Board proceedings and the restricted scope (as to parties) of the relief sought are themselves justification for a departure from Chancery practice which aims at settling all the rights

[30] In the *United Shoe Machinery* case, supra, the Court said that "no right of the lessee could be injuriously affected by the injunction which was prayed in the case" (258 U. S. at 456). If this statement refers to a denial of legal injury, we agree with it; but if it purports to be stating an *economic* result, the question arises whether anyone can confidently make such a determination without hearing the affected party on that issue.

in controversy. Compare *Shields* v. *Barrow*, 17 How. 129, 136).

A second obstacle to acceptance of the argument is that procedure before the Board is, except for possible qualifications where constitutional rights are concerned, within the control of Congress. The procedure established by Congress, in our opinion (*supra*, pp. 54–55), precludes any inference that notice and hearing to others than employers is a requisite of jurisdiction to issue the remedial order in question here. There certainly is slight basis, if any, for concluding that Congress intended to adopt as part of the statutory procedure to prevent unfair labor practices a vague formula, not susceptible of accurate description, as to indispensable parties. See *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 80. The *Consolidated Edison* case does not hold that Congress intended to adopt equity practice in proceedings under the Act. We think the opinion clearly indicates that the suggestion that the Brotherhood and its locals were entitled to notice and hearing under the circumstances was prompted by doubts as to the constitutional validity of the Act if not so construed (305 U. S. at 233).[31] The proceeding in question here arises under entirely different circumstances. There is no constitutional objection properly before the Court (see p. 55, *supra*), and even

[31] The Brotherhood and its locals urged the lack of notice on their own behalf in this Court (305 U. S. at 232). There is no indication in the opinion that anyone else could have raised this objection.

if there were, there is no merit to it (see pp. 55–58, *supra*).[32]

Jurisdiction to review orders of the Board, it is true, is vested in a court with equity powers. *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 373. But, as this Court has said, "court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action." *United States* v. *Morgan,* 307 U. S. 183, 191. We submit that a proper regard for the appropriate function of the Board in vindicating the public interest in the prevention of unfair labor practices would lead to the enforcement of the order in question here. See *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 552, and cases there cited.

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[32] For the information of the Court, we wish to point out that the present *Rules and Regulations* of the Board provide that—

Whenever the complaint contains allegations under Section 8 (2) of the Act, any labor organization referred to in such allegations shall be duly served with a copy of the complaint and notice of hearing. Whenever any labor organization, not the subject of any 8 (2) allegation in the complaint, is a party to any contract with the respondent the legality of which is put in issue by an allegation of the complaint, such labor organization shall be made a party to the proceeding. (*Art.* II, Sec. 5, *Rules and Regulations* (Series 2), effective July 14, 1939.)

IV

THE CHARGE WAS FULLY ADEQUATE TO SUPPORT THE COMPLAINT AND ORDER

The charge which initiated the present proceeding was filed by the Union on August 2, 1937. Its material provisions are as follows:

> Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that National Licorice Company has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (2) and (5) of said Act, in that the said National Licorice Company has by means of threat and intimidation, coerced and attempted to coerce its employees into signing individual contracts with the said company; in that the said company has called meetings of its employees and has compelled said employees to attend said meetings, and has attempted to compel said employees to form committees, not of their own choosing, to bargain collectively with the said company; in that the said company has by threat and intimidation of its employees, interfered with the formation and administration of the Labor Organization of the undersigned; in that the said company refuses to bargain collectively with representatives of the employees.
>
> The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act (R. 772–773).

Petitioner's objection (Brief pp. 20–24) to the alleged variance between the charge and the complaint was not raised at any stage of the proceedings before

the Board.[33] Having failed to afford the Board an opportunity to consider and pass upon its objection, petitioner is prevented by the language of Section 10 (e) [34] from raising the matter in the courts.

Apart from this consideration, petitioner's contention is without merit. Preliminarily, it is important to note that the alleged lack of correspondence between the charge and the complaint has no bearing upon the question whether petitioner received due notice of the contentions of the Board. It is the complaint, and not the charge, which serves to put a respondent on notice of the respects in which he is asserted to have infringed the Act, and against which he is called upon to defend. Section 10 (b) of the Act; *Board Rules and Regulations* (Series 1, as amended) Article II, Section 10; see *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333. Hence, any disparity which may exist between the charge and the

[33] An entirely different objection, namely, that the Board had allegedly erroneously failed to serve petitioner with a copy of the "original" charge, was urged in petitioner's answer; at the hearing; in a memorandum to the trial examiner; and again in the exceptions to the Intermediate Report. The Board took note of the objection in its decision and order (R. 872). Petitioner did not raise the objection before the Circuit Court of Appeals nor does it urge the point in this Court. The objection was, of course, entirely without merit, in view of the obvious fact that the proceeding arose out of the so-called "amended charge," which completely superseded and rendered irrelevant the earlier document, and was served.

[34] The relevant portion of Section 10 (e) provides "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court * * *."

complaint goes solely to the technical question of compliance with the procedural formalities prescribed by the statute and raises no question of due process of law. Petitioner apparently makes no serious contention to the contrary. We turn, therefore, to the question of the extent, if any, to which the complaint is at variance with the charge, and the legal effect of such variance as may exist.

1. The charge sets forth that petitioner "coerced and attempted to coerce its employees into signing individual contracts" in violation of Section 8 (1), and "attempted to compel said employees to form committees, not of their own choosing, to bargain collectively with the * * * company," in violation of Section 8 (2). The complaint (R. 777) makes almost identical allegations. Specifically, it recites that petitioner formed and initiated a labor organization of its employees at the Brooklyn plant, dominated and interfered with the administration of that organization, and has continued to do so "down to and including the date of the issuance of this complaint" (R. 777–779); that petitioner "has made signing of individual contracts a condition of employment" (R. 777); and that by these and other acts petitioner "is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of said Act" (R. 778–779). Beyond question, then, the complaint "states the charges" with respect to the unfair labor practices, as required by Section 10 (b) of the Act and Article II, Section 5 of the *Rules and Regulations* of the Board

in force at the time of the events here under consideration.[35]

Petitioner's unlawful attempts to form and dominate a labor organization, and its efforts to induce its employees to sign individual agreements did not cease, however, as of the date of the verification of the charge. On the contrary, the same pattern of action, with immaterial variations, continued, with increasing effectiveness, from the date of the filing of the charge down to the time the complaint was issued. While the complaint, since it speaks as of a later date than the charge, embodied this subsequent conduct of petitioner, it does not set forth any new or different unfair labor practices. The unfair labor practices alleged in the complaint are the identical practices set out in the charge, chronologically extended to the date of issuance of the complaint. In the words of the Circuit Court of Appeals:

> The respondent complains that the Board's order was jurisdictionally unsupported because the "charge" on which the complaint issued, and the complaint itself, contained nothing about the formation of the company union, or the individual contracts of the respondent with the men.[36] We have held that a "charge" is a condition precedent upon the Board's power to is-

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[35] All references to the *Rules and Regulations* in this discussion are to National Labor Relations Board *Rules and Regulations*, Series 1, as amended, which were in force at the time of the events here under consideration.

[36] Petitioner's contention, summarized in the quoted language of the Court, that the charge and the complaint contained nothing about "the formation of the company union, or the individual contracts" is unsupported, since, as we have pointed out, both the charge and the complaint referred in specific terms to petitioner's

sue a complaint (*National Labor Relations Board* v. *Hopwood Retinning Co.*, 2 Cir. 98 F. 2d 97) but we need not consider here how far it confines the proceeding to matters then existing, but not included. For here no "charge" could have included the company union and it was not necessary that it should. The original controversy had resulted in a strike; the strike had failed; the company union followed on the failure; and *the Board was within its powers in treating the whole sequence as one,* and in reestablishing the workmen's freedom, by ending the company union's privilege to represent them (R. 913). [Italics added.]

2. Although the complaint in the instant case did not in fact go beyond the charge by adding allegations as to new unfair labor practices, petitioner's position is no stronger if it be assumed, *arguendo,* that the complaint sets forth unfair practices not described in the charge. Section 10 (b) requires that the complaint "state the charges" in respect to the unfair labor practices, as was done in the instant case. There is nothing in the Act which justifies the inference that once the Board's powers have been invoked by the filing of a charge against an employer, the exercise of those powers is confined to the precise matters stated in the charge. To contend otherwise is, in our opinion, to misapprehend both the administrative machinery and the purpose of proceedings under the Act.

As to the first point, charges are commonly prepared and filed by laymen, chiefly working men and the unions

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attempts to establish a company-dominated union, and to its efforts to impose individual contracts upon the men (R. 772–773, 777–779).

to which they belong. Such documents are not legal pleadings. If they were embodied without alteration or amendment in complaints, decidedly imperfect legal instruments would result.

Congress did not, however, command that the Board's complaint must embody the charge without modification or addition. Section 10 (b) does not provide that the complaint shall state *only* the charges. The provision of that section for amendment of the complaint by the Board "in its discretion at any time prior to the issuance of an order based thereon" contains no reference to the need of a correspondingly amended charge.[37] Furthermore, Congress by clear implication authorized the Board to conduct an investigation into the matters alleged in the charge prior to issuing a complaint. Sections 10 (b) and 11 (1). Common sense teaches that in such an investigation the Government is likely to uncover evidence of additional and supplementary unfair labor practices. Surely it is unreasonable to contend that the Board is debarred from embodying the result of its investigation in its complaint without first going through the useless formality of furnishing the charging party with a statement of the findings of the Board's investigators and requesting that such party file a supplemental charge setting forth the results of the investigation.

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[37] In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, the original complaint related to the discharge of five employees. During the course of the hearing the complaint was amended to add the name of another employee, Solosy, to those alleged to have been wrongfully discharged. The charge was not correspondingly amended. (See pp. 4–6 of the record in Case No. 19, U. S. Supreme Court, October Term, 1938.) The Board's order for the reinstatement of Solosy was upheld by this Court. 305 U. S., at 237.

The assertion that the Board may not take cognizance in its complaint of additional unfair labor practices which appear from the course of an investigation following the filing of a charge confuses proceedings under the Act with those between private parties in ordinary civil litigation. A proceeding before the Board is not a controversy between the party making the charge and the employer. The charge is a device for bringing an alleged violation of the Act to the attention of the Board. The Act authorizes the Board to decide in its discretion whether to issue a formal complaint, and a proceeding is commenced only if such a complaint is issued. The case or controversy then is between the Government, represented by the Board, and the respondent-employer, not between the person filing the charge and the respondent-employer. *Agwilines, Inc.* v. *National Labor Relations Board,* 87 F. (2d) 146 (C. C. A. 5th); *National Labor Relations Board* v. *Colten,* 105 F. (2d) 179 (C. C. A. 6th); *Blankenship* v. *Kurfman,* 96 F. (2d) 450 (C. C. A. 7th). The proceeding is like that under the Federal Trade Commission Act. That Act does not "provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name, the prosecution is wholly that of the Government; * * *. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute" a proceeding. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 25. This language is equally applicable to the National Labor Relations Act, the procedural provisions of which were in large part modeled on the Federal Trade

Commission Act. The effectuation of the important public purposes of the present statute requires that, once the Board's attention has been called, through the filing of a charge, to an alleged violation of the Act, the Board shall be empowered to prevent whatever unlawful actions its investigation may uncover. To hold otherwise is to declare that the governmental function of preventing unfair labor practices affecting commerce may be exercised only upon the terms and within the limitations prescribed by the private individual upon whose motion the proceeding was instituted by the Board. Such a result would negate the purposes of the Act and could not have been contemplated by Congress.

CONCLUSION

It is submitted that the decision of the court below, insofar as it enforced the order of the Board, was correct and should be affirmed.

Respectfully submitted.

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JANUARY 1940.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Supp. IV, Sec. 151 *et seq.*) are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bar-

gain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a conse-

quence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage mem-

bership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the poli-

cies of this act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused

because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the

Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

The relevant provisions of National Labor Relations Board Rules and Regulations, Series 1, as amended April 27, 1936, are as follows:

ARTICLE I

SECTION 1. The terms "person," "employer," "employee," "representatives," "labor organization," "commerce," "affecting commerce," and "unfair labor practice," as used herein, shall have the meanings set forth in Section 2 of the National Labor Relations Act, a copy of which Act is appended hereto.

ARTICLE II

SECTION 1. A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person or labor organization. A charge may be withdrawn only with the consent of the Regional Director with whom such charge was filed or of the Board. Upon withdrawal of any charge, the Regional Director shall dismiss any complaint based thereon.

* * * * *

SEC. 4. Such charge shall contain the following:

(a) The full name and address of the person or labor organization making the charge.

(b) The full name and address of the person against whom the charge is made (hereinafter referred to as the "respondent").

(c) A clear and concise statement of the facts constituting the alleged unfair labor practice affecting commerce, particularly stating the names of the individuals involved and the time and place of occurrence.

SEC. 5. After a charge has been filed, if it appears to the Regional Director that a proceeding in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the "parties to the proceeding") a formal complaint in the name of the Board stating the charges and containing a notice of hearing before a Trial Examiner at a place therein fixed and at a time not less than five days after the service of the complaint. A copy of the charge shall be attached to the complaint.

* * * * *

SEC. 7. Any such complaint may be amended by the Trial Examiner or the Board in his or its discretion at any time prior to the issuance of an order based thereon, upon such terms as may be deemed just.

* * * * *

SEC. 9. If, after the charge has been filed, the Regional Director declines to issue and cause to be served a complaint, the person or labor organization making the charge may obtain a review of such action by filing a request therefor with the Board in Washington, D. C., and filing a copy of such request with the Regional Director.

SEC. 10. The respondent shall have the right, within five days from the service of the complaint, to file an answer thereto. Such answer shall contain a short and simple statement of the facts which constitute the grounds of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state, such statement operating as a denial. Any allegation in the complaint not specifically denied in the answer, unless respondent shall state in the answer that respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the Board.

* * * * *

SEC. 13. In any case where a complaint has been amended the respondent shall have an opportunity to amend his answer within such period as may be fixed by the Trial Examiner, if he amends the complaint, or by the Board, if it amends the complaint.

* * * * *

SEC. 19. Any person or labor organization desiring to intervene in any proceeding shall file a motion in writing with the Regional Director issuing the complaint setting out the grounds upon which such person or organization claims to be interested. The original of such motion shall be assigned and sworn to by the person or labor organization filing the motion, who shall file three additional copies of such motion for the use of the Board. Immediately upon filing such motion, the moving party shall serve a copy thereof upon each of the other parties to the proceeding. The Regional Director shall rule upon all such motions filed prior to the hearing, and the Trial Examiner shall rule upon all such motions filed at the hearing, in the manner set forth in Section 15 of this Article. The Re-

gional Director or the Trial Examiner, as the case may be, may by order permit intervention in person or by counsel to such extent and upon such terms as he shall deem just. The Regional Director shall cause a copy of said ruling to be served upon each of the parties to the proceeding.

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SUPREME COURT OF THE UNITED STATES.

No. 272.—October Term, 1939.

National Licorice Company, Petitioner, vs. National Labor Relations Board. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 4, 1940.]

Mr. Justice Stone delivered the opinion of the Court.

Apart from the sufficiency of the evidence to support an order of the National Labor Relations Board, the questions of importance presented for our decision are whether the Board has authority to order an employer not to enforce contracts with its employees, found to have been procured in violation of the National Labor Relations Act, and to contain provisions violating that act, in the absence of the employees as parties to the proceeding; and whether the Board has authority to make its order relating to the contracts, although the unfair labor practices found to affect the contracts were not set up in the charge presented to the Board, on the basis of which it issued its complaint.

On August 2, 1937, the Bakery & Confectionery Workers International Union of America, Local Union No. 405, a labor organization, affiliated with the American Federation of Labor, lodged with the National Labor Relations Board an amended charge, alleging that petitioner had engaged in certain unfair labor practices in violation of the National Labor Relations Act. After a complaint by the Board charging petitioner with unfair labor practices had been served October 7, 1937, and after hearings, the Board found jurisdictional facts, which need not be repeated, and other facts which may be shortly summarized as follows: Petitioner is engaged in business in the manufacture of licorice products which it sells and ships in commerce, employing at its Brooklyn, New York plant about one hundred and forty production employees. The Board found that early in July, 1937, the Union began to secure signatures of petitioner's employees to applications for

membership; that on July 14, 1937, ninety-nine of petitioner's one hundred and forty employees had signed applications for membership, designating the Union as the applicant's representative for collective bargaining; that the number had increased to one hundred and nine on July 19th or 20th. On that date a meeting was held between representatives of the Union and officers of petitioner, at which the Union demands were presented. The negotiations came to nothing and were promptly followed by an unsuccessful effort on the part of petitioner's representatives to circulate among the employees a petition, nominating a committee to act as their collective bargaining representative.

On July 29th a second meeting took place between representatives of the Union and the president and other officers of the company, at which the petitioner declined to recognize the Union as the bargaining representative of all the employees, and declared that it would negotiate with the Union only as the bargaining representative of its members. The meeting adjourned without reaching any agreement. On August 2nd the employees went out on strike. The plant was closed and not reopened until the conclusion of the strike on August 25th. August 5th had been agreed upon for a third meeting, and on the evening of August 2nd, after the strike had begun, the Union representatives wrote to petitioner stating that the Union was ready to meet with petitioner at any time or place which it would designate "in order to mediate the dispute and through collective bargaining arrive at a mutually satisfactory agreement." Petitioner replied, declaring that it believed the Union had called the strike. It cancelled the meeting of August 5th and asserted that it would not "set any further time for negotiations until we have a letter from you informing us as to whether or not this strike was instigated, ordered or approved by your Union or officials of the Union." Representatives of the Union denied that it had called the strike. The Board found that the strike was the result of spontaneous action by the employees because of dissatisfaction with the course of negotiations between the Union and petitioner.

On August 27th after the plant was reopened, petitioner sent a letter to each employee requesting him to return to work on August 30th. On the same day petitioner's representative met with three employees who stated that they were anxious to return to work, and asked whether they could have their own committee and bargain

with petitioner. They were informed that if they could obtain the authorization of a majority of the employees, petitioner would deal with them. Thereafter, petitioner's president, at the request of one of the three, prepared a form of letter designating a committee of workers as the Collective Bargaining Representatives of the employees and revoking the authority to any other organization. The letter was signed by the members of the committee and one hundred and ten other employees, and returned to petitioner on September 9th.

At a meeting with the Committee on September 10th petitioner's president renewed proposals for a contract, which he had made at the meetings with the Union representatives on July 20th and July 29th, stipulating for a five per cent. wage increase, time and a half for overtime, and one week's vacation with pay. The Committee's only request related to pay for holidays and a reduction of the term of the contract from five to three years, which was granted with some modification. As finally agreed upon the contract purports to be made between the petitioner, the Committee and "each and every one of the employees".[1] Petitioner furnished the Committee members with mimeographed copies of the agreement, telling them to explain it to the best of their ability to the employees, and giving explicit instructions as to the manner in which the individual contracts were to be executed. There was testimony by a number of witnesses that petitioner's president informed the employees that he would not "protect their jobs and they would not get five per cent. if they did not sign the agreement. One group of fourteen employees asked for representation on the Committee and were referred to petitioner's president, who, in refusing the request, informed them that "the Committee had been picked already. There is enough right now on the Committee." The contract is stated to be directly between the petitioner and the individual employee and under it the Committee as such has no rights or duties. It was signed by the Com-

[1] An officer of petitioner admitted that he had consulted with the Brooklyn Chamber of Commerce in forming the contracts. The contracts involved here follow the "Balleisen formula", said to be devised by L. L. Balleisen, Industrial Secretary of the Chamber. The contract "executed between the company and each workman individually and not as a collective agreement with representatives of the employees, as provided by the Act", National Labor Relations Board *v.* Hopwood Retinning Co., 98 F. (2d) 97, 100, has been held to violate the Act in National Labor Relations Board *v.* Hopwood Retinning Co., *supra;* National Labor Relations Board *v.* American Mfg. Co., 106 F. (2d) 61, 66; Matter of Atlas Bag & Burlap Co., 1 N. L. R. B. 292; Matter of Cating

mittee and one hundred and eighteen employees. The Committee appears to have functioned only so long as it was necessary to obtain the individual signatures on the contract. The benefits of the contract were limited to those employees who signed. In return the signers relinquished the right to strike, the right to demand a closed shop or signed agreement with any union. The contract also contained provisions for arbitration as to rate of wages and the number of regular hours of employment per week by an arbitrator designated by and mutually acceptable to petitioner and the Committee, but provided that the "question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation. . . ."

From these subsidiary findings of fact the Board concluded that petitioner, by refusing to bargain collectively with the Union on July 20th and July 29th and thereafter had engaged in unfair labor practices within the meaning of § 8(5) of the Act; that petitioner, by coercing and intimidating employees in the exercise of their rights to self-organization and collective bargaining, and by persuading and coercing its employees to refrain from becoming members of the Union and to sign individual contracts of employment, had engaged in an unfair labor practice within the meaning of § 8(1) of the Act, and that by initiating, sponsoring and dominating a labor organization of its employees, the Collective Bargaining Committee, it had engaged in unfair labor practices within the meaning of § 8(1) and (2) of the Act. The Board's order directed petitioner to desist from dominating and interfering with the administration of the Collective Bargaining Committee, from recognizing the Committee as representing petitioner's employees, from giving effect to petitioner's contracts with the Committee and with the individual employees, and from refusing to bargain collectively with the Union. As affirmative relief, designed to effectuate the policy of the Act as authorized by § 10(c), the Board ordered petitioner to bargain collectively, on request, with the Union; to withdraw recognition from the Committee; to inform the Committee and employees who had contracted individually that "such contract con-

Rope Works, Inc., 4 N. L. R. B. 1100; Matter of Metropolitan Engineering Co., 4 N. L. R. B. 542; Matter of David E. Kennedy, Inc., 6 N. L. R. B. 699; Matter of Art Crayon, Inc., 7 N. L. R. B. 102; Matter of Eastern Footwear Corp., 8 N. L. R. B. 1245; Matter of American Numbering Machine Co., 10 N. L. R. B. 536; Matter of Centre Brase Works, Inc., 10 N. L. R. B. 1060; Matter of Fanny Farmer Candy Shops, Inc., 10 N. L. R. B. 288; Matter of National Meter Co., 11 N. L. R. B. 320.

stitutes a violation" of the Act; that the employees are relieved from all obligations under it; that petitioner will "no longer demand its performance" and to post appropriate notices.

The Court of Appeals for the Second Circuit, upon petition of the Board for enforcement of the order, directed that it be enforced except for a modification of that part of the order which directed that petitioner recognize and bargain with the Union. The order of the Court of Appeals directed that this part of the Board's order be conditioned upon a determination in an election that the Union is still the choice as bargaining representative of a majority of the employees. 104 F. (2d) 655.

Upon a petition which challenged the authority of the Board to make so much of its order as related to the contracts with petitioner's employees, without making the employees parties to the proceeding, we granted certiorari October 9, 1939, because of the importance of the question in the administration of the National Labor Relations Act, and because of an asserted misapplication of the principles of *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261 and *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197. Of lesser moment are questions, also raised by the petition,[2] whether the Board's finding that the Union was still the authorized bargaining representative of a majority of petitioner's employees, is supported by substantial evidence and, if not, whether the Circuit Court of Appeals properly directed the Board to conduct an election to determine whether the Union still represents a majority of petitioner's employees, and, finally, whether the jurisdiction of the Board is limited to such unfair labor practices as are set up in the charge presented to the Board so as to preclude its determination that the creation of the Organization Committee and petitioner's contracts with individual employees involved unfair labor practices, since both occurred after the charge was lodged with the Board and after its complaint was served on petitioner.

1. The Board found that petitioner, on July 20th and 29th, 1937, and thereafter, refused to recognize and to bargain collectively with the representative (the Union) of a majority of its employees. If we assume, as petitioner argues, that a majority of its employees had

[2] Petitioner's brief assails the Board's order on numerous grounds not set up in his petition for certiorari. We limit our review to the questions specifically raised in the petition. Rule 38. See General Pictures Co. v. Electric Co., 304 U. S. 175, 177, 178.

freely revoked their designation of the Union as bargaining representative and chosen in its stead the Collective Bargaining Committee, these circumstances do not militate against the findings of the Board that the Union represented the employees during July and August when the petitioner refused to bargain with it, nor do they relieve petitioner from the consequences of its refusal to bargain, which was an unfair labor practice.

Since the Court of Appeals has confirmed the findings of the Board, there is no occasion here to review the evidence in detail. *Cincinnati, etc., Ry. Co.* v. *Interstate Commerce Commission*, 206 U. S. 142, 154; *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 456. It is enough, with the findings not challenged, that there is evidence that by July 20th one hundred and nine of petitioner's one hundred and forty employees had signed applications for membership in the Union, designating it as the applicant's representative for collective bargaining, and that on that date negotiation began between petitioner and the Union representatives which was continued until August. The evidence shows that attempts by petitioner between that date and July 20th to circulate a petition among its employees nominating a committee to act as their collective bargaining representative failed. A few employees signed. Then, a number cancelled their signatures. The petition was returned to the petitioner's superintendent and was destroyed by an assistant secretary of the company. There is testimony that at the meeting with the Union representatives on July 29th petitioner's president declined to recognize the Union as the bargaining representative of all the employees, and declared that he would negotiate with it only as the bargaining representative of the Union members, refusing to bargain with it as the representative of all the employees, a plain violation of the Act. §§ 8(5), 9(a). This was followed by petitioner's refusal, on August 2nd, to negotiate with Union representatives. There was also evidence from which the Board could have found that the negotiations on July 20th and July 29th were not entered into by the petitioner in good faith, and were but thinly disguised refusals to treat with the Union representatives.

In view of the evidence already noted of the choice of the Union as bargaining representative by a large majority of the employees between July 14th and 20th, of the complete failure of petitioner's efforts to disturb that representation between the 20th and the 29th,

there was substantial evidence to support the Board's conclusion that the Union was the choice as bargaining representative of appellant's employees during July and in August, at least until the 5th, when petitioner refused to treat with the Union.

As will presently appear, the bargaining committee and the contracts obtained through its mediation were both the products of unfair labor practices, and the Committee, under the Board's order, was not entitled to recognition as the bargaining representative of the employees. Such injury, if any, as the petitioner might have suffered from the Board's order requiring it to recognize and bargain with the Union, is avoided by the direction of the Court of Appeals that this part of the order be conditioned upon a determination by an election that the Union is still the choice of a majority of the employees. The Board has not petitioned for certiorari and does not complain of this direction.

2. The petition for certiorari does not assail the findings of the Board that petitioner's officials initiated the organization of the Committee, and that it "sponsored and dominated the formation of the Committee and thereafter dominated its administration and contributed support to it". We shall not re-examine those issues here, more than to say that the evidence discloses that the purpose of creating the Committee was to secure the contracts and by the contracts the Committee was left without any further function to perform except to join with the employer in choosing an arbitrator for the arbitration of specified labor disputes.

But the petition raises the question whether the terms of the contract, as the Court of Appeals held, violate the National Labor Relations Act and it challenges the authority of the Board because of the absence of the individual employees, as parties, to make any order respecting the contracts. The contracts, as the Board found, were not only procured through the mediation of a company-dominated labor organization, but they were the means adopted to "eliminate the Union as the collective bargaining agency of its employees". We think it plain also that by their terms they imposed illegal restraints upon the employees' rights to organize and bargain collectively guaranteed by §§ 7 and 8 of the Act.

By the contract each employee agreed not "to demand a closed shop or a signed agreement by his employer with any Union". This provision foreclosed the employee from bargaining for a closed shop or a signed agreement with the employer, frequent

subjects of negotiation between employers and employees, see *Consolidated Edison Company* v. *National Labor Relations Board, supra,* 236, *et seq.; National Labor Relations Board* v. *Sands Mfg. Co.,* 306 U. S. 332, 342; cf. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 553, 555, note 7. In addition the restriction upon the employee's right to ask a signed agreement extending only to agreements with "any union" is in plain conflict with the public policy of the Act to encourage the procedure of collective bargaining, see § 1, since it discriminates against labor organizations by forbidding signed contracts with labor unions while it permits them with the individual workers. See *Consolidated Edison Co.* v. *National Labor Relations Board, supra,* 236.

It likewise forestalls collective bargaining with respect to discharged employees, first providing that a discharged employee may submit to the employer facts indicating that his discharge was unreasonable and then stipulating that the "question as to the propriety of an employee's discharge is in no event to be one for arbitration or mediation." The effect of this clause was to discourage, if not forbid any presentation of the discharged employee's grievances to appellant through a labor organization or his chosen representatives, or in any way except personally.

Since the contracts were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act, they were appropriate subjects for the affirmative remedial action of the Board authorized by § 10 of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc., supra,* 265; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.,* No. 20, this term, decided December 4, 1939. Hence the Board was free by its order to direct that the appellant should take no benefit from the contracts unless it was without authority to act because the individual signers of the contracts had not been made parties to the proceeding. It is urged that in the absence of the employees who signed the contract, the Board was powerless to declare it void and of no effect as to those employees, and that consequently it could make no order forbidding petitioner to make use of the contracts as the means of defeating the policy and purposes of the Act.

Consolidated Edison Co. v. *National Labor Relations Board, supra,* is not decisive of this question. There, page 236, after point-

ing out that the Board's "power to command affirmative action is remedial, not punitive, and is to be exercised in the aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act", decision was rested specifically on the ground that "here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective."

It is elementary that it is not within the power of any tribunal to make a binding adjudication of the rights *in personam* of parties not brought before it by due process of law. *Pennoyer* v. *Neff*, 95 U. S. 714; *Riverside and Dan River Cotton Mills* v. *Menefee*, 237 U. S. 189; cf. *Arizona* v. *California*, 298 U. S. 558, 571, 572. For that reason there is no occasion to consider now how far the contract rights, if any, of the employees may be passed upon by the Board and their exercise restricted by its order in proceedings to which the employees have been made parties. As the Board's power can be effectively exercised only upon petitioner, the employees are entitled to notice and hearing only if the statute requires them to be made parties to the proceeding. Consequently the only question we are called on to decide is whether, in the circumstances of this case, the exercise of the Board's authority is such a departure from accepted modes of procedure as rightly to be regarded as beyond the power conferred on the Board by § 10 of the Act.

The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. No. 342, *Amalgamated Utility Workers, etc.*, v. *Consolidated Edison Co., et al.*, decided this term; H. Rept. No. 1147, 74th Cong., 1st Sess., Committee on Labor, p. 24; cf. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19. It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining

and by protecting the "exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. . . ." § 1. The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§ 7, 8, are practices tending to thwart the declared policy of the Act. To that end the Board is authorized to order the employer to desist from such practices, and by § 10(c) it is given authority to take such affirmative remedial action as will effectuate the policies of the Act. *National Labor Relations Board* v. *Pennsylvania Greyhound, supra.*

In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it. *Shields* v. *Barrow*, 17 How. 130, 140; *Carroll* v. *New York Life Ins. Co.*, 94 F. (2d) 333; cf. *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33, 48. Such a judgment or decree would be futile if rendered, since the contract rights asserted by those present in the litigation could neither be defined, aided nor enforced by a decree which did not bind those not present.

But different considerations may apply even in private litigation where the rights asserted arise independently of any contract which an adverse party may have made with another, not a party to the suit, even though their assertion may affect the ability of the former to fulfill his contract. The rights asserted in the suit and those arising upon the contract are distinct and separate so that the Court may, in a proper case, proceed to judgment without joining other parties to the contract, shaping its decree in such manner as to preserve the rights of those not before it. *General Investment Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 285, 286; *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 10 F. Supp. 512, 515, aff'd 76 F. (2d) 1002; *Fidelity & Deposit Co. of Maryland* v. *Montana*, 92 F. (2d) 693, 698; *Brogdex Co.* v. *Food Machinery Co.*, 92 F. (2d) 787, 789; *Commercial Casualty Insurance Co.* v. *Lawhead*, 62 F. (2d) 928, 931, 932; cf. *Hamilton* v. *Savannah F. & W. Ry. Co.*, 49 Fed. 412; *Howe* v. *Howe & Owen Ball*

Bearing Co., 154 Fed. 820, 828; *Alcazar Amusement Co.* v. *Mudd & Colley Amusement Co.*, 204 Ala. 509; *E. L. Husting Co.* v. *Coca-Cola Co.*, 194 Wis. 311; *Nokol Co.* v. *Becker*, 318 Mo. 292.

Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union or an unlawful contract with employees, as the means of defeating the statutory policy and purpose. Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes or by insisting more than in a private litigation, that the employer's obedience to the Act, cannot be compelled in the absence of the workers who have thus renounced their rights.

The Board's order runs only against petitioner. It directs that it shall cease recognizing the Committee as the representative of any of the employees for the purpose of dealing with petitioner concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work; that it shall not "give effect" to the contracts with its employees; that it notify each employee that the contract violates the Act and that petitioner "is therefore obliged to discontinue such contract as a term or condition of employment, and the employees are released from its obligations and the respondent [petitioner here] will no longer demand its performance", and that it "will no longer offer, solicit, enter into, continue, enforce or attempt to enforce such contracts with its employees."

The effect of the Board's order, as we construe it, is to preclude the petitioner from taking any benefit of the contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act. It does not foreclose the employees from taking any action to secure an adjudication upon the contracts, nor prejudge their rights in the event of such adjudication. We do not now

consider their nature and extent. It is sufficient to say here that it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it. Section 10(a) and (c) of the Act commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practice.

In these respects the order does not go beyond those in suits brought by the United States to restrain violations of the Sherman Act, where the injunction was broad enough to prevent the offender from carrying out contracts with persons not parties to the suits. *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 456; *Paramount Famous Corp.* v. *United States*, 282 U. S. 30; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 220. Similarly, in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstanding contracts by the offender. Such orders have never been challenged because the holders of the contracts were not made parties. E.g. *Butterick Co.* v. *Federal Trade Commission*, 4 (F. (2d) 910; *Q.R.S. Music Co.* v. *Federal Trade Commission*, 12 F. (2d) 730; *J. W. Kobi Co.* v. *Federal Trade Commission*, 23 F. (2d) 41. Cf. *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441. In *Virginian Railway Co.* v. *System Federation No. 40, supra*, 539, 540, 11 F. Supp. 621, 623, the effect of the decree was to order the employer to deal exclusively with the Federation, although the employer had a contract with an association not a party to the suit, found to be a dominated labor organization. In every case the third persons were left free to assert such legal rights as they might have acquired under their contracts. But in all; the public right was vindicated by restraining the unlawful actions of the defendant even though the restraint prevented his performance of the contracts.

As the National Labor Relations Act contemplates no more than the protection of the public rights which it creates and defines, and as the Board's order is directed solely to the employer and is ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal, we think they

are not indispensable parties for purposes of the Board's order and the statute does not require their presence as parties to the present proceeding and there was no abuse of the Board's discretion in its failure to make them parties.[3] It is unnecessary to consider now to what extent or by what procedure it would be necessary to make the employees parties to a proceeding pending before the Board in the event that it undertook to make an order directed to the employees foreclosing any asserted rights under their contracts in order to effectuate the policies of the Act. Compare the procedure used in *New England Divisions Case*, 261 U. S. 184, 197.

The Board's order to post notices requires the notice to announce that the contracts with the employees are "void and of no effect". In order that the notice may more accurately represent the affirmative action of the Board and that misinterpretation of its action may be avoided, the order appealed from should be so modified as to omit the quoted words and direct that clause (3) of the Board's order, numbered 2(d) specifying the contents of the notice, read as follows:

(3) that the individual contracts of employment entered into between the respondent and some of its employees were made by the respondent in violation of the National Labor Relations Act; and that the respondent will no longer offer, solicit, enter into, continue, enforce, or attempt to enforce such contracts with its employees; but this is without prejudice to the assertion by the employees of any legal rights they may have acquired under such contracts.

3. The amended charge, which initiated the present proceeding pursuant to § 10(b) of the Act, was lodged with the Board by the Union on August 2, 1937, before petitioner had succeeded in organizing the Committee and in securing the signatures of its employees to the contracts, but after petitioners unsuccessful attempt in July to deal with its employees independently of the Union. The charge, in addition to other unfair labor practices not now material, alleged

[3] Orders of the Board have been upheld which direct the employer to cease giving effect to such contracts, although no notice was given to the company-dominated labor organizations or the employees. National Labor Relations Board v. Hopwood Retinning Co., 98 F. (2d) 97, 99, 100; National Labor Relations Board v. Eagle Mfg. Co., 99 F. (2d) 930; National Labor Relations Board v. Ronni Parfum, Inc., 104 F. (2d) 1017; National Labor Relations Board v. Stackpole Carbon Co., 105 F. (2d) 167, 169; Titan Metal Mfg. Co. v. National Labor Relations Board, 106 F. (2d) 254. *Contra:* National Labor Relations Board v. Cowell Portland Cement Co., 108 F. (2d) 198; National Labor Relations Board v. Sterling Electric Motors, Inc., — F. (2d) —, 5 Labor Relations Reporter 600.

that petitioner had "coerced and attempted to coerce its employees into signing individual contracts with the said company; in that the said company has called meetings of its employees and has compelled said employees to attend said meetings, and has attempted to compel said employees to form committees, not of their own choosing, to bargain collectively with the said company; . . ."

The complaint elaborated the charge with particularity, setting forth that petitioner had formed and initiated a labor organization of its employees, dominated and interfered with the administration of that organization, and had continued to do so down to the date of the complaint, October 2, 1937; that petitioner "has made signing of individual contracts a condition of employment"; and that by these and other acts petitioner "is interfering with, restraining, and coercing its employees in exercise of the rights guaranteed by § 7 of the Act".

Petitioner contends that the charge is a jurisdictional prerequisite to the complaint and subsequent proceedings, and that they are restricted to the specific unfair labor practices alleged in the charge. See *National Labor Relations Board* v. *Hopwood Retinning Co.*, 98 F. (2d) 97. It argues that in the proceedings before the Board there was a fatal departure from the charge insofar as the Board's finding and order are concerned with the subsequent organization of the Committee and the signing of the employees' contracts. The argument is adressed only to want of power in the Board and raises no question of unfairness to petitioner in the preparation and prosecution of his case.

It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint and found by the Board were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of the same class

of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. We think the Court below correctly held that "the Board was within its power in treating the whole sequence as one."

We find it unnecessary to discuss other points raised by the petitioner. We have considered them and find them without merit.

The order below will be modified as directed by this opinion and as so modified it will be affirmed.

So ordered.

Mr. Justice MURPHY took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS.

Mr. Justice BLACK and I see no reason or occasion for the modification of the order. For as stated in the opinion of the Court, the Board has not undertaken to pass on the rights of the employees under those contracts. Nor has any employee urged, here or below, that the order affects his contractual rights or casts a cloud on them. Whether the employees would be indispensable parties to the proceeding should the Board in order to effectuate the policies of the Act undertake to nullify their rights is a question on which we want to reserve decision until the Board passes on it and until it is put in issue by persons who have a standing to raise it.